No. 92-741-CFX Title: Federal Deposit Insurance Corporation, Petitioner
v.
John H. Meyer, et al.

Docketed: October 27, 1992 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Sep 16 1992	Application (A92-224) to extend the time to file a petition for a writ of certiorari from September 27, 1992 to October 27, 1992, submitted to Justice O'Connor.
	Sep 22 1992	Application (A92-224) granted by Justice O'Connor extending the time to file until October 27, 1992.
	Oct 27 1992	Petition for writ of certiorari filed.
	Nov 12 1992	Order extending time to file response to petition until December 29, 1992.
	Dec 28 1992	Brief of respondents John Meyer, et al. in opposition filed.
	Jan 6 1993	DISTRIBUTED. February 19, 1993
	Feb 4 1993	Reply brief of petitioner filed.
	Feb 22 1993	REDISTRIBUTED. February 26, 1993
	Mar 1 1993	REDISTRIBUTED. March 5, 1993
	Mar 15 1993	REDISTRIBUTED. March 19, 1993
	Mar 16 1993	Record requested.
	Mar 17 1993	Record filed.
	Mar 18 1993	Record filed.
	Mar 22 1993	Petition GRANTED.
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	May 7 1993	Order extending time to file brief of petitioner on the merits until May 13, 1993.
	May 13 1993	Brief of petitioner Federal Deposit Insurance Corporation filed.
	May 13 1993	Joint appendix filed.
	Jun 23 1993	Brief of respondents John Meyer, et al. filed.
	Jun 23 1993	Brief amicus curiae of National Employment Lawyers Association filed.
	Jul 26 1993	Reply brief of petitioner Federal Deposit Insurance Corporation filed.
	Aug 2 1993	CIRCULATED.
	Aug 16 1993	SET FOR ARGUMENT MONDAY, OCTOBER 4, 1993.(1ST CASE).
	Oct 4 1993	ARGUED.

FILED

OCT 27 1992

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

FEDERAL DEPOSIT INSURANCE CORPORATION

v.

JOHN H. MEYER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

1. Whether the Federal Savings and Loan Insurance Corporation (FSLIC), a federal agency, may be held liable for tort damages arising out of an alleged violation of due process pursuant to a right of action implied under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

2. Whether FSLIC, acting as receiver for an insolvent banking institution, violated the Due Process Clause by terminating the employment of an officer of the failed institution without affording any opportunity for a hearing.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Robert Pattullo was a defendant in the district court and appellee in the court of appeals.

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No.

FEDERAL DEPOSIT INSURANCE CORPORATION

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Federal Deposit Insurance Corporation, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The decision of the court of appeals (App., *infra*, 1a-34a) is reported at 944 F.2d 562.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1991. A petition for rehearing was denied on June 29, 1992. On September 22, 1992, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including October 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides: "nor shall any person * * * be deprived of life, liberty, or property, without due process of law." The pertinent statutory provisions are reprinted in an appendix to this petition. App., *infra*, 37a-39a.

STATEMENT

Respondent was an officer of a thrift institution that was placed under federal receivership after it became insolvent. In order to protect the public, FSLIC receivers are given broad discretion to summarily replace the management of failed institutions placed in receivership. After respondent's employment was terminated without a hearing, he brought this damage action challenging the constitutionality of FSLIC's practice.

1. On April 13, 1982,[1] the Federal Home Loan Bank Board appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as federal receiver for an insolvent California thrift institution, Fidelity Savings and Loan. See 12 U.S.C. 1729(c)(2) (1982).[2]

FSLIC designated Robert Pattullo to serve as its special representative with responsibility for the receivership. App., *infra*, 2a-3a. On the first day of the federal receivership, Mr. Pattullo terminated the employment of four top officials of Fidelity, including respondent, without affording them any opportunity to contest the decision. At the time of his termination, respondent was Executive Vice President of Fidelity and his brother was President. Respondent had been an employee of Fidelity for 16 years. App., *infra*, 2a; C.A. Supp. Rec. Exc. 10. Respondent was responsible for branch operations of Fidelity. He was

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[1] The court of appeals erred in stating that the receivership began on April 13, 1983. App., *infra*, 2a & n.1. See Supp. C.A. Rec. Exc. 10 (Complaint); *id.* at 89-90 (joint statement of stipulated facts).

[2] Under 12 U.S.C. 1729(b)(1)(A) (1982), when FSLIC was appointed receiver of an insolvent financial institution, it was charged with the responsibility

> (i) to take over the assets of and operate [the insolvent] institution;
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> (ii) to take such action as may be necessary to put it in a sound solvent condition;
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> (iii) to merge it with another insured institution;
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> (iv) to organize a new Federal association to take over its assets;
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> (v) to proceed to liquidate its assets in an orderly manner; or
>
> (vi) to make such other disposition of the matter as it deems appropriate;
>
> whichever it deems to be in the best interest of the association, its savers, and the Corporation * * *.

The Federal Deposit Insurance Corporation (FDIC) has comparable responsibilities when serving as receiver under current law. See 12 U.S.C. 1821, 1822, 1823 (Supp. II 1990) (FDIC). That authority was "designed to give the FDIC power to take all actions necessary to resolve the problems posed by a financial institution in default." H.R. Rep. No. 54(I), 101st Cong., 1st Sess. Pt. 1, at 330 (1989). Under 12 U.S.C. 1441a(b)(4), RTC has "the same powers and rights to carry out its duties with respect to" institutions placed in its receivership "as the [FDIC]," with certain exceptions not pertinent here.

not responsible for the loan practices that caused Fidelity's insolvency. C.A. Supp. Rec. Exc. 88.

2. Approximately one year after termination of his employment, respondent filed an action for damages under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against Fidelity, FSLIC, and Pattullo. Respondent alleged that under California law, he had a right not to be terminated from long-term and permanent employment absent good cause, and that FSLIC lacked good cause to terminate his employment. The complaint alleged that FSLIC's and Pattullo's termination of his employment without affording him any hearing constituted a deprivation of a state-created property interest without due process of law, in violation of the Fifth Amendment. C.A. Supp. Rec. Exc. 13-14. In addition, the complaint alleged that the United States was liable under the Federal Tort Claims Act (FTCA) for tortious breach of respondent's implied employment contract and implied covenant of good faith and fair dealing. C.A. Supp. Rec. Exc. 15.

Prior to trial, the district court held that respondent's action against the United States was barred both by the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), and by the FTCA exception for claims "arising out of * * * interference with contract rights," 28 U.S.C. 2680(h). However, the court denied motions to dismiss the action against FSLIC and Pattullo, and the *Bivens* claims against those defendants were accordingly tried before a jury.

The jury found FSLIC liable to respondent in the amount of $130,000. By special verdict, the jury concluded that respondent had "a legitimate claim of entitlement to employment or a reasonable expectation of continued employment arising out of an implied contract with Fidelity" and that FSLIC "fail[ed] to provide [respondent] a hearing, the reasons for his discharge, and an opportunity to contest the reasons for his discharge before his termination." C.A. Rec. Exc. 63-64. In addition, the jury concluded that this violation of due process damaged respondent in the amount of $130,000, which represented losses suffered "as a result of [respondent's] discharge from employment." C.A. Rec. Exc. 64. The jury found that Pattullo was entitled to the defense of qualified immunity because he had acted in good faith. App., *infra*, 3a-4a; C.A. Rec. Exc. 64.

3. The court of appeals affirmed. The court rejected arguments by FDIC, which had been substituted for FSLIC,[3] that the court lacked authority to award tort damages against a federal agency under *Bivens* and that FSLIC had not violated respondent's constitutional rights.

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[3] As a result of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, FSLIC was abolished. FDIC has replaced FSLIC as receiver for Fidelity and was substituted for FSLIC as defendant in this suit. See FIRREA § 401(f)(2), 12 U.S.C. 1437 note (Supp. II 1990). Under FIRREA, either FDIC or the Resolution Trust Corporation (RTC) may be appointed as receiver for an insolvent institution, depending on the circumstances. The authority of FDIC and RTC as receivers is similar to, but generally broader than, that exercised by FSLIC in this case. See 12 U.S.C. 1821(d), 1821(e) (Supp. II 1990) (FDIC).

a. The court of appeals concluded that *Bivens* provides a damages remedy for constitutional deprivations of due process committed by federal agencies with statutory authority to "sue and be sued."[4] First, the court rejected the argument that the FTCA barred creation of a *Bivens* remedy here. Although the FTCA provides that "[t]he authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title," 28 U.S.C. 2679(a), the court concluded that a claim arising out of a constitutional violation is not "cognizable" under Section 1346(b). App., *infra*, 4a-20a. The court reasoned that only suits based upon violations of state law are "cognizable" because 28 U.S.C. 1346(b) only provides a remedy "for injury or loss of property * * * under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." See App., *infra*, 37a. The court acknowledged that at least some tort claims on which the FTCA does not permit recovery are viewed as "cognizable" for purposes of Section 2679(a). But the court limited that category to claims that are controlled by what it termed "explicit" exclusions, such as the provisions denominated "exceptions" in 28 U.S.C. 2680. App., *infra*, 8a-9a.

[4] See 12 U.S.C. 1725(c)(4) (1982). The charters of both FDIC and RTC include sue-and-be-sued clauses. See 12 U.S.C. 1819 Fourth (FDIC); 12 U.S.C. 1441a(b)(10)(F) (Supp. II 1990) (RTC).

Second, having concluded that it was legally irrelevant that Congress did not permit recovery under the FTCA for the constitutional tort alleged in this case, the court found that FSLIC's sue-and-be-sued clause should be read to permit an award of damages pursuant to a cause of action implied under the Constitution. In the court's view, that clause represented a "general waiver of sovereign immunity" sufficient to extend to respondent's claim for damages under *Bivens*. App., *infra*, 5a.

b. The court also concluded that the termination of respondent's employment without a hearing violated due process. App., *infra*, 21a-28a. The court reasoned that California law provided respondent with a property interest in employment absent good cause for termination. App., *infra*, 22a-23a. The court rejected FDIC's argument that any such property interest under state law was negated by controlling federal regulations and the statutory scheme governing bank receiverships, which permitted FSLIC to terminate indefinite employment contracts without a hearing. Those laws provided FSLIC with "power to * * * [r]eject or repudiate any lease or contract which it considers burdensome," 12 C.F.R. 569a.6(c)(3) (1982),[5] defined any employment contract for an "excessive term" as a forbidden "unsafe and unsound practice," 12 C.F.R. 563.39 (1982), and permitted FSLIC broad authority to operate, reorganize, merge, or liquidate insolvent institutions, see note 2, *supra*. The court nevertheless held that "[t]he fact that

[5] The power of FDIC and RTC to repudiate contracts is now codified at 12 U.S.C. 1821(e)(1) (Supp. II 1990) (FDIC); 12 U.S.C. 1441a(b)(4) (Supp. II 1990) (RTC).

federal and, arguably, state law conferred wide discretion to receivers to repudiate 'burdensome' contracts does not, retrospectively, annul the state entitlement." App., *infra*, 26a.[6] It accordingly held that the federal receiver's right to "dispose expeditiously of burdensome contracts" did not absolve FSLIC of its constitutional duty to provide Meyer with "an opportunity to be heard" on the question whether his state law implied contract should be repudiated. App., *infra*, 28a.

REASONS FOR GRANTING THE PETITION

In 1971, this Court held in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, that the Constitution vested federal courts with authority to recognize an implied cause of action for damages against federal officials who have deliberately engaged in unconstitutional conduct. For the first 20 years after *Bivens* was decided, no appellate court ever held that the remedy recognized in *Bivens* could be expanded to provide a cause of action directly against a federal agency. In this case, however, the court of appeals has concluded that any

[6] The court also distinguished cases in which it had rejected procedural due process challenges by employees dismissed by the Federal Reserve Board and the Federal Home Loan Bank. See *Bollow* v. *Federal Reserve Bank*, 650 F.2d 1093, 1098-1101 (9th Cir. 1981), cert. denied, 455 U.S. 948 (1982); *Inglis* v. *Feinerman*, 701 F.2d 97 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984). The court held that, although the analogy to those cases was "seductive," App., *infra*, 24a, it failed because Fidelity, prior to its takeover, was a state-chartered savings institution, rather than a federal bank created pursuant to federal statutes.

agency with authority to "sue and be sued" is subject to damages for constitutional violations under *Bivens*. The court reached this result even though the same claim, if pled under state law tort principles, would be barred by the Federal Tort Claims Act. This holding circumvents the limitations on tort remedies Congress established in the FTCA, conflicts with decisions of other courts of appeals, and portends an unwarranted expansion of litigation against federal agencies. Accordingly, review by this Court is warranted.

The court of appeals' holding that FSLIC's conduct violated the Constitution likewise merits this Court's review. By holding that due process requires federal receivers to provide employees with hearings concerning cause for their removal, the decision threatens to undermine their ability to act swiftly and efficiently to handle the affairs of insolvent banks with the least possible risk to federal insurance funds and to the public's confidence in our banking system. In the last six years, federal receivers have assumed control of more than 1750 failed financial institutions. Other banks and thrifts will fail as well, but until this decision is overturned, FDIC, RTC and their officials are at risk for damage awards when they seek to summarily replace managers of failed financial institutions in accordance with their authority under federal law. Such unauthorized interference in federal receivers' management of financial institution failures should not be permitted to stand.

1. The court of appeals' unprecedented recognition of a *Bivens* remedy against a federal agency was improper for several related reasons: the FTCA pro-

vides an exclusive remedy for tort damages against FSLIC and other sue-and-be-sued agencies; the authority to "sue and be sued" does not constitute a waiver of sovereign immunity for implied claims under the Constitution; and the court exceeded its authority under *Bivens* by implying a remedy against a federal agency where a variety of factors "counsel[] hesitation." *Bivens*, 403 U.S. at 396.

a. The court fundamentally misinterpreted the role of the FTCA in tort litigation against federal agencies. Courts have repeatedly held that the FTCA provides the exclusive damage remedy for claims that a federal agency caused tortious injuries. See, *e.g.*, *United States* v. *Smith*, 111 S. Ct. 1180 (1991); *Loeffler* v. *Frank*, 486 U.S. 549, 561-562 (1988); *Galvin* v. *OSHA*, 860 F.2d 1281, 1283 (5th Cir. 1980).

In this case, however, the court articulated two reasons for departing from that rule: FSLIC is a sue-and-be-sued agency, and a tort claim arising out of a federal constitutional violation is not "explicitly" barred by the FTCA. Neither factor, however, merits circumvention of the FTCA framework for tort recoveries—a framework that immunizes a variety of important governmental functions, requires administrative exhaustion of claims, precludes jury trials, and prohibits punitive damages.

First, Congress determined that the tort liability of sue-and-be-sued agencies should be coextensive with the tort liability of other federal agencies. See 28 U.S.C. 2679(a). See also S. Rep. No. 1400, 79th Cong., 2d Sess. 33, 34 (1946) ("It is intended that neither corporate status nor 'sue and be sued' clauses shall, alone, be the basis for suits for money recovery

sounding in tort," so as to "place torts of 'suable' agencies of the United States upon precisely the same footing as torts of 'nonsuable' agencies."). The court of appeals' ruling, however, destroys the uniformity Congress chose by creating a supplemental scheme of tort liability for sue-and-be-sued agencies.

Second, claims for constitutional deprivations are "cognizable" under the FTCA—and therefore subject to its limitations—regardless of whether recovery is barred. The FTCA provides that many types of tort claims against federal agencies are not actionable. For example, 28 U.S.C. 2680, entitled "Exceptions," provides that sovereign immunity is not waived for injuries caused by a variety of allegedly tortious acts, such as those arising from performance of a discretionary function, 28 U.S.C. 2680(a). Further, the basic waiver of sovereign immunity set forth in 28 U.S.C. 1346(b) itself excludes several types of tort claims. Strict liability claims—*i.e.*, those claims not "caused by the negligence or wrongful act or omission" of a federal employee—are excluded. See *Dalehite* v. *United States*, 346 U.S. 15, 44-45 (1953); *Laird* v. *Nelms*, 406 U.S. 797, 801 (1972). Claims not caused by a federal employee "while acting within the scope of his office or employment" are excluded. See *Hatahley* v. *United States*, 351 U.S. 173, 180-181 (1956). And claims that do not arise "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" are excluded.

Plaintiffs have regularly argued that tort claims that may not be brought against a federal agency

under the FTCA are not "cognizable" under the statute, as that term is used in 28 U.S.C. 2679(a). Until this case, courts have uniformly rejected that contention,[7] and this Court recently rejected a precisely analogous contention in *United States* v. *Smith*, 111 S. Ct. 1180, 1185-1186 & n.9 (1991) (provision making FTCA remedy against United States exclusive of remedy against employee applicable even when FTCA bars recovery against United States).

In this case, there is no question that the FTCA would have barred recovery for the injury alleged. If respondent characterized the claim as one for wrongful termination under state law, the discretionary function exception would foreclose recovery; indeed, the district court dismissed respondent's action against the United States on precisely that ground. If respondent instead characterized the claim as one arising out of unconstitutional governmental action, recovery would be barred because a "private person" would not be liable under state law for such conduct. The Ninth Circuit entirely circumvented

[7] See, *e.g.*, *Taylor* v. *Administrator of the SBA*, 722 F.2d 105 (5th Cir. 1983); *Northridge Bank* v. *Community Eye Care Center, Inc.*, 655 F.2d 832, 834-835 (7th Cir. 1981); *FDIC* v. *Citizens Bank & Trust Co.*, 592 F.2d 364, 371 (7th Cir.), cert. denied, 444 U.S. 829 (1979); *Expeditions Unlimited Aquatic Enters., Inc.* v. *Smithsonian Inst.*, 566 F.2d 289, 296-299 (D.C. Cir. 1977), cert. denied, 438 U.S. 915 (1978); *Safeway Portland Employees Fed. Credit Union* v. *FDIC*, 506 F.2d 1213, 1215 (9th Cir. 1974); *Edelman* v. *FHA*, 382 F.2d 594 (2d Cir. 1967); *Goddard* v. *District of Columbia Redevelopment Land Agency*, 287 F.2d 343, 345-346 & n.3 (D.C. Cir.), cert. denied, 366 U.S. 910 (1961); *Freeling* v. *FDIC*, 221 F. Supp. 955, 956 (W.D. Okla. 1962), aff'd per curiam, 326 F.2d 971 (10th Cir. 1963).

these long-standing requirements by finding that constitutional torts are not "cognizable" under the FTCA.

The court reached its conclusion by distinguishing between claims "explicitly" excluded from the FTCA's coverage by one of the specific provisions of 28 U.S.C. 2680, and claims "implicitly" excluded from the FTCA's coverage by one of the qualifications of the basic waiver provision, 28 U.S.C. 1346(b).[8] This dis-tinction makes no sense, and simply casts a blind eye to the fact that Congress deliberately chose to make a federal agency's tort liability similar to that of "private persons." Moreover, there is no question that Congress contemplated that the FTCA would provide a remedy against federal agencies for a variety of acts that contravened federal constitutional law as well as state law. See, *e.g.*, 28 U.S.C. 2680(h) (providing a damage remedy against the United States for the type of law enforcement conduct found unconstitutional in *Bivens* to the extent permitted by state tort law). There is, accordingly, no basis to disregard the careful limitations Congress placed on damages recovery for such violations of constitutional rights by finding that no constitutional torts are "cognizable" under the Act.

The court of appeals' decision on this issue is not only incorrect, but it also conflicts with decisions of

[8] The court did not explain whether claims that are excluded on other grounds—for instance, because the claimant failed to submit a timely administrative claim, see 28 U.S.C. 2675(a)—would fall into the "explicit" or "implicit" category.

other circuits.[9] In *Peak* v. *SBA*, 660 F.2d 375 (8th Cir. 1981), the Eighth Circuit held that the FTCA barred a suit against the SBA, a sue-and-be-sued agency, under a state workers' compensation statute that provided for strict liability. The court rejected the argument that, because a strict liability suit is barred by Section 1346(b), it falls outside Section 2679(a)'s exclusive remedy provision and may be brought under the agency's sue-and-be-sued clause itself. 660 F.2d at 377-378. The court made quite clear that the exclusions in Section 1346(b)—"implicit" exclusions, according to the Ninth Circuit in this case—are to be treated no differently from the specific exceptions of Section 2680. As the Eighth Circuit explained, Congress "created the FTCA as a uniform, systematic, and exclusive remedy for the torts of federal agencies" and "if no recovery is allowed under the FTCA for an action sounding in tort, there is simply no remedy afforded." 660 F.2d at 378. The Eighth Circuit's decision in *Peak* is inconsistent with the Ninth Circuit's decision in this case.

The Ninth Circuit's decision is also inconsistent on its facts with *Ascot Dinner Theatre, Ltd.* v. *SBA*, 887 F.2d 1024 (10th Cir. 1989). In *Ascot*, the plaintiff claimed that its First Amendment rights were violated when the SBA denied it a loan guaranty because it engaged in constitutionally protected expression. Citing 28 U.S.C. 2679(a), the court held that "the

[9] The reasoning of the court of appeals is also in substantial tension with this Court's decision in *Smith*, as well as with all of the decisions holding that tort claims excluded from FTCA coverage are nonetheless "cognizable" under the FTCA, see note 7, *supra*.

express authority of any federal agency 'to sue and be sued' does not alter the FTCA as the exclusive remedy for actions sounding in tort." 887 F.2d at 1028. The court held that the action could not be brought under the FTCA, because it fell within the discretionary function exception, see 887 F.2d at 1029, and it could not be brought under the SBA's sue-and-be-sued clause because Section 2679(a) "com-pletely forecloses such a tort recovery." 887 F.2d at 1029.

Ascot demonstrates that the Tenth Circuit does not permit actions for constitutional torts to be brought against sue-and-be-sued agencies, at least where those actions would fall within the FTCA's discretionary function exception. That same principle would require dismissal of this suit. Both *Ascot* and this case involved "constitutional tort" claims, see 887 F.2d at 1028, against sue-and-be-sued agencies. Moreover, there is no doubt that respondent's claim, like the plaintiff's claim in *Ascot*, would be barred by the FTCA's discretionary function exception. See *United States* v. *Gaubert*, 111 S. Ct. 1267 (1991). Accordingly, although the Tenth Circuit did not specifically rely on the private person/local law requirement of Section 1346(b), the Tenth Circuit's result in *Ascot* is inconsistent with the result reached by the Ninth Circuit in this case.[10]

[10] The Ninth Circuit's decision in this case is also in substantial tension with *Contemporary Mission, Inc.* v. *United States Postal Service*, 648 F.2d 97, 105 n.9 (2d Cir. 1981), and *McCollum* v. *Bolger*, 794 F.2d 602, 608 (11th Cir. 1986), cert. denied, 479 U.S. 1034 (1987). In those cases, the Second and Eleventh Circuits relied on 28 U.S.C. 2679(a) and 1346(b) to hold that the Postal Service's sue-and-be-sued clause did not provide a waiver of sovereign immunity for constitutional

b. Even if the FTCA did not provide the exclusive remedy for plaintiff's claim, FDIC's sue-and-be-sued clause would still fail to provide a waiver of sovereign immunity applicable to this action. This Court has explained that Congress subjected federal agencies to sue-and-be-sued clauses in order to "launch[] [such agencies] into the commercial world," *FHA* v. *Burr*, 309 U.S. 242, 245 (1940), and that the liability of such agencies under the clause "is the same as that of any other business." *Franchise Tax Bd* v. *United States Postal Service*, 467 U.S. 512, 520 (1984). Thus, "when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied." *Id.* at 517. Accord *Loeffler* v. *Frank*, 486 U.S. 549, 554-555 (1988). Nonetheless, this Court's decisions have repeatedly

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torts. The court of appeals here distinguished those cases and a similar Ninth Circuit case involving the Postal Service, *Pereira* v. *United States Postal Service*, 899 F.2d 861, 864 (9th Cir. 1990), modified, 942 F.2d 577 (1991) and 964 F.2d 873 (1992), on the ground that the Postal Service's governing statute provides that the FTCA "shall apply to tort claims arising out of activities of the Postal Service." See 944 F.2d at 570 (citing 39 U.S.C. 409(c)). We doubt that the distinction is sound, since the statute the court cites merely subjects the Postal Service to the FTCA and would appear to have no effect on the analysis of what claims are "cognizable" under Section 1346(b). Moreover, although the Eleventh Circuit in *McCollum* does advert to the same Postal Service statute, there is nothing in the opinions in *Contemporary Mission* or *McCollum* to suggest that those courts would have applied a different analysis had the case involved a sue-and-be-sued agency other than the Postal Service.

emphasized that a restriction on such a waiver is appropriate when "certain types of suits are not consistent with the statutory or constitutional scheme" or a "restriction * * * is necessary to avoid grave interference with the performance of a governmental function or * * * for other reasons it was plainly the purpose of Congress to use the sue-and-be-sued clause in a narrow sense." *Franchise Tax Bd.*, 467 U.S. at 517-518; see also *Loeffler* v. *Frank*, 486 U.S. at 556-557.

Imposing liability on FSLIC for a constitutional tort claim such as that advanced in this case would not subject FSLIC to liability "the same as that of any other business," *Franchise Tax Bd.*, 467 U.S. at 520, since the Constitution generally does not restrict the conduct of private entities. Cf. *Loeffler* v. *Frank*, 486 U.S. at 557 (permitting interest awards against Postal Service under sue-and-be-sued clause "to the extent that interest is recoverable against a private party as a normal incident of suit"); *Peoples Nat'l. Bank* v. *Meredith*, 812 F.2d 682, 684-685 (11th Cir. 1987); *Queen* v. *TVA*, 689 F.2d 80, 85 (6th Cir. 1982), cert. denied, 460 U.S. 1082 (1983). Instead, by subjecting the federal receiver to liability to which no private party would be subject, it would amount to "grave interference with the performance of [the federal receiver's] governmental function" to resolve quickly and decisively the problems caused by the insolvent institution.[11] Moreover, permitting constitutional tort suits under FSLIC's sue-and-be-sued

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[11] See, *e.g.*, *Langley* v. *FDIC*, 484 U.S. 86, 91 (1987); *FDIC* v. *Merchants Nat'l Bank*, 725 F.2d 634, 637-638 (11th Cir. 1984); *FSLIC* v. *Murray*, 853 F.2d 1251, 1256 (5th Cir. 1988).

clause would be "inconsistent" with Congress's decision, in enacting the discretionary function exception, not to subject policy decisions by federal agencies to after-the-fact judicial review via the mechanism of a tort suit. See *United States* v. *Gaubert*, 111 S. Ct. 1267, 1277 (1991). Accordingly, under well-settled principles articulated in this Court's cases, FSLIC's sue-and-be-sued clause is not a waiver of sovereign immunity applicable to constitutional tort claims.

c. Finally, the court of appeals' unprecedented determination that a private plaintiff can bring a *Bivens* action directly against a federal agency is both misguided and unsettling. In *Bivens* itself, this Court held that, despite the absence of specific congressional authorization, an individual who can demonstrate an injury as the consequence of a violation of his Fourth Amendment rights by an individual federal employee may bring a suit for money damages against that employee. In thus implying a private right of action directly from the Constitution in favor of an injured plaintiff, the Court made clear that the action could be brought against the federal employee whose constitutional violation caused the injury, not against the government itself. The Court noted that there were no "special factors counselling hesitation" in implying a cause of action in favor of the plaintiff because the cause of action it recognized did not involve "a question of 'federal fiscal policy.'" 403 U.S. at 396.

This case raises the question whether a court may imply a *Bivens* cause of action when to do so *would* involve "a question of 'federal fiscal policy'" because

a federal agency is the defendant. This Court's opinion in *Bivens* recognized that fact as a "special factor[] counselling hesitation," and nothing in this Court's succeeding cases concerning the circumstances under which a *Bivens* action may be implied cast any doubt on that conclusion. See *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988); *United States* v. *Stanley*, 483 U.S. 669 (1987); *Chappell* v. *Wallace*, 462 U.S. 296 (1983); *Bush* v. *Lucas*, 462 U.S. 367 (1983); *Carlson* v. *Green*, 446 U.S. 14 (1980); *Davis* v. *Passman*, 442 U.S. 228 (1979).

Other factors counsel hesitation as well. As noted above, Congress made clear in enacting the discretionary function exception to the FTCA that it intended to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984); see *United States* v. *Gaubert*, 111 S. Ct. at 1273. That exception specifically precludes suits "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty * * *, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). Indeed, because judicial review in tort suits of administrative (or legislative) policy choices would raise core separation of powers concerns, this Court has noted Congress's belief that "claims of the kind embraced by the * * * exception would have been exempted from the waiver of sovereign immunity by judicial construction" even if Congress had not

included the exception in the FTCA. *Varig Airlines*, 467 U.S. at 810.

FSLIC's action in dismissing respondent is plainly the type of discretionary function that Congress sought to protect from judicial review in tort suits. In *Gaubert*, this Court held that decisions concerning the proper steps to take to preserve a struggling thrift institution prior to its takeover by federal authorities fell within the discretionary function exception. As the Court put it, such decisions "involved the exercise of discretion in furtherance of public policy goals." 111 S. Ct. at 1279. The decisions made by a federal receiver after takeover of an insolvent thrift—including decisions about which employees to terminate and which contracts to repudiate—involve similarly sensitive policy choices and would similarly fall within the discretionary function exception if challenged under the FTCA. The court of appeals' decision to imply a *Bivens* remedy here impermissibly expands judicial review of administrative and legislative policy choices in the face of Congress's express prohibition of such review. Cf. *Schweiker* v. *Chilicky*, 487 U.S. at 428-429.

2. The court of appeals also erred in concluding that FSLIC violated the Due Process Clause when it terminated respondent's employment without a hearing. Respondent did not have a protected property interest, and even if one could be found, the receivership claims process afforded him all the process that would be due.

a. Contrary to the court of appeals' conclusion, respondent did not have a legally protected, state-created property interest in continued employment

after his employer became insolvent and FSLIC was appointed as federal receiver. As this Court has explained, "[p]roperty interests are not created by the Constitution," but instead "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 538 (1985). Where an individual is employed by a federal receiver, however, federal law—not state law—governs the employment relationship and provides whatever property rights the individual may enjoy as a result of his employee status.

When FSLIC was appointed receiver for the insolvent Fidelity Savings and Loan, a sea change occurred in that institution's legal and contractual relationships.[12] Ordinary commercial relationships and contractual obligations between Fidelity and those with whom it did business—relationships previously governed by state law—were substantially altered or, in some cases, invalidated. See, *e.g.*, *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 456 (1942). Similarly, ordinary employment relationships were no longer governed by state law. Since respondent's employer was now FSLIC as receiver, respondent's rights arising out of his employment contract became subject to federal, not state, law. See *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979); *United States* v. *Seckinger*, 397 U.S. 203 (1970) (citing cases); *United States* v. *County of Allegheny*, 322 U.S. 174 (1944). Accordingly, respondent retained a

[12] See *FDIC* v. *Shain, Schaffer & Rafanello*, 944 F.2d 129, 134, 137 (3d Cir. 1991); *Gaff* v. *FDIC*, 919 F.2d 384, 389 (6th Cir. 1990), modified, 933 F.2d 400 (6th Cir. 1991).

right to continued employment after FSLIC was appointed receiver only if federal law recognized that right.

The insurmountable difficulty for respondent is this: Federal law does not recognize such a right. Instead, Congress vested federal receivers with "a broad mandate" to take whatever actions are necessary to reorganize or liquidate an insolvent banking in-stitution. *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 580 (1989); see *id.* at 568-572. That mandate necessarily includes a right to terminate bank managment at will—a right that FSLIC and FDIC have regularly exercised in the public interest. See *Gaubert*, 111 S.Ct. 1267 at 1279 (observing that "[w]hen a governmental agency holds such great powers over its offspring, even to the point of appointing a conservator or receiver to replace the management * * *, it is difficult to hold that an informal request, even demand, to clean house would amount to an abuse of the statutory powers and discretion of the agency," quoting *Miami Beach Federal Savings & Loan Ass'n* v. *Callander*, 256 F.2d 410 (5th Cir. 1958)). To recognize a right to continued employment in those circumstances would "frustrate specific objectives of" the federal banking receive-rship scheme since the very essence of receivership is new managment. *Kimbell Foods*, 440 U.S. at 728. For its part, the court of appeals purported to rely on *FDIC* v. *Mallen*, 486 U.S. 230 (1988), as support for its conclusion that respondent had a property interest in continued employment, *Mallen* does not in any way cast doubt on the conclusion that employees of institutions in receivership do not have the same

property rights that may have attached prior to the receivership.[13] The court of appeals' reliance on a state law property right was accordingly wholly misplaced.

b. Even if respondent's state law rights survived FSLIC's acquisition of the institution, his claim under the Due Process Clause woul fail. FSLIC, like other receivers appointed to wind up the affairs of an insolvent entity, had common law authority to

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[13] In *Mallen*, a bank officer was suspended pursuant to a federal statute requiring suspension of bank officers who are indicted for felonies involving dishonesty or breach of trust. 486 U.S. at 233. The parties did not dispute that the officer's "interest in the right to continue to serve as president of the bank and to participate in the conduct of its affairs is a property right protected by the Fifth Amendment Due Process Clause," a conclusion with which the Court agreed. 486 U.S. at 240. The only issue in the case was whether the procedures afforded the officer in connection with his deprivation of that interest were adequate, and the Court held that they were.

Neither the Court nor the parties in *Mallen* specified the source of law from which the bank officer's property interest arose or the precise scope of that property interest. Insofar as the property interest in *Mallen* arose from federal law, it provides no support for the court of appeals' conclusion; creation of such a right in the circumstances of this case would be fundamentally inconsistent with controlling principles of federal law. But even if the officer's property interest in *Mallen* arose from state law, the circumstances in *Mallen* were entirely different from those in this case. FDIC in *Mallen* was not functioning as receiver for the bank, it was not responsible for paying the salaries of the bank employees, and it was not responsible for selling or liquidating the institution as soon as possible.

repudiate contracts.[14] See 12 C.F.R. 569a.6(c)(3) (1982). Due process in such situations requires only that a party injured by such a repudiation have the opportunity to submit a claim—not to demand specific performance—that will be paid in accordance with whatever reasonable priorities are fixed by law.[15] Thus, even if respondent could find a valid source of law for his right to continued employment by FSLIC, his dismissal reduced that right to a claim against the estate, for which he was entitled to receive payment in accordance with priorities set by law. See 12 U.S.C. 1729(d) (1982); 12 C.F.R. 569a.7-569a.9 (1982). See generally *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989). Since he was not deprived

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[14] See, *e.g.*, *Erie Malleable Co.* v. *Standard Parts Co.*, 299 F. 82, 85-86 (6th Cir. 1924); *Greenblatt* v. *Ottley*, 430 N.Y.S.2d 958, 963 (Sup. Ct. 1980); *Riker* v. *Browne*, 204 N.Y.S.2d 60, 62 (Sup. Ct. 1960); *Rosenbaum* v. *United States Credit-System Co.*, 40 A. 591, 593 (N.J. Ct. Error and App. 1898); *Birmingham Trust & Sav. Co.* v. *Atlanta B & A Ry.*, 271 F. 731, 738 (N.D. Ga. 1921). Some courts have held that upon appointment of a receiver, employment contracts terminate as a matter of law. See *Wade* v. *Mutual Bldg. & Loan Ass'n*, 145 S.E. 18, 19 (N.C. 1928); *People* v. *Globe Mut. Life Ins. Co.*, 91 N.Y. 174, 179-180 (1883); *Ely* v. *Van Kannel Revolving Door Co.*, 184 F. 459, 462 (C.C. E.D.N.Y. 1911); *Lenoir* v. *Linville Improvement Co.*, 36 S.E. 185, 188 (N.C. 1900). The Bankruptcy Code gives a bankruptcy trustee authority to repudiate the debtor's contracts. See 11 U.S.C. 365(a) (bankruptcy trustee may "reject any executory contract"), 1113 (collective bargaining agreements).

[15] See, *e.g.*, *Kuehner* v. *Irving Trust Co.*, 299 U.S. 445, 451-452 (1937); *Continental Illinois Nat'l Bank & Trust Co.* v. *Chicago Rock Island & Pacific Ry.*, 294 U.S. 648, 680-681 (1935); *Hanover Nat'l Bank* v. *Moyses*, 186 U.S. 181, 192 (1902).

of his claim, if any, against the estate, he was deprived of no property interest recognized by the Due Process Clause.

4. The court of appeals' decision threatens dramatic interference with this nation's efforts to deal with failed financial institutions. Since its inception in August 1989, the Resolution Trust Corporation (RTC) has been appointed receiver of more than 650 thrift institutions. Since 1986, FDIC has been appointed receiver for more than 1100 financial institutions. Even if limited to its effect on FDIC and RTC, the court of appeals' decision permits any individual whose contractual or other state-law property rights are affected by those receiverships to sue the federal receiver for money damages for violations of a procedural due process right. This Court has observed that FDIC and RTC often have to act "with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services." *Langley* v. *FDIC*, 484 U.S. 86, 91 (1987). The court of appeals' decision poses a serious threat to their ability to resolve the problems caused by insolvent financial institutions, at a potentially enormous cost to the federal fisc and the public's confidence in the banking system.

The court of appeals' decision also dramatically expands the exposure of numerous other sue-and-be-sued agencies to tort liability.[16] As the wrongful

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[16] Among the government agencies whose charters contain sue-and-be-sued clauses are the SBA, see 15 U.S.C. 634(b)(1), the Export-Import Bank of the United States, 12 U.S.C. 635, the Farm Credit Administration, see 12 U.S.C. 2013(4), the Student Loan Marketing Association, 15 U.S.C. 2289(1), the

termination turned "due process" claim at issue in this case illustrates, a litany of tort claims can readily be recharacterized as constitutional torts so as to circumvent all of the carefully crafted limitations of the FTCA. Under the court of appeals' rationale, plaintiffs bringing such claims will not be required to pursue administrative claims, they can obtain punitive damages, they are entitled to jury trials, and most of all, they can obtain recovery where the FTCA would bar it. In this way, a plaintiff can compel federal compensation for policy decisions, intentional torts, or any other type of agency action, so long as his injury could be pleaded in the language of the constitution. Because Congress has never authorized such suits, further review is warranted.

Commodity Credit Corporation, 20 U.S.C. 1087-2(i)(1), the Overseas Private Investment Corporation, 22 U.S.C. 2199(d), and the Pension Benefit Guaranty Corporation, 29 U.S.C. 1302(b)(1). Other agencies' charters include sue-and-be-sued clauses limited to the administration of specific programs. See 20 U.S.C. 1082(a) (Department of Education); 42 U.S.C. 404a (Depart-ment of Housing and Urban Development).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 89-16695, 90-15025

JOHN H. MEYER, PLAINTIFF/APPELLANT
CROSS-APPELLEE

v.

FIDELITY SAVINGS, ET AL., DEFENDANTS
AND
FEDERAL SAVINGS AND LOAN INSURANCE
CORPORATION, DEFENDANT-APPELLEE/
CROSS-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Filed Apr. 5, 1991]

BEFORE TANG, FARRIS AND D.W. NELSON, CIRCUIT JUDGES

D.W. NELSON, CIRCUIT JUDGE:

With the enactment of the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-80, Congress partially punctured the immunity of the sovereign. At the same time, however, it limited the relief available

against parties other than the government by making the United States the exclusive defendant in various situations. This case presents one of the numberless questions arising out of this interplay: Whether a suit predicated on the tortious deprivation of fifth amendment due process, and therefore arguably beyond the reach of the FTCA, may nonetheless be brought against the Federal Savings and Loan Insurance Corporation ("FSLIC") pursuant to a "sue-and-be-sued" clause. We hold that it may.

I.

In 1966, plaintiff John Meyer ("Meyer") joined Fidelity Savings & Loan ("Fidelity"), where he remained for the ensuing sixteen years. By 1982, at the time he was terminated, he had reached the position of executive vice-president. That same year, as a result of dubious loan policies, Fidelity began experiencing severe financial difficulties. They finally came to a head on April 13, 1983, when California's Savings and Loan Commissioner seized Fidelity's assets and appointed the (FSLIC) as state receiver. Because the FSLIC was later appointed the sole federal receiver by the Federal Home Loan Bank Board pursuant to 12 U.S.C. § 1729(c)(2), federal receivership replaced state receivership by operation of law.[1] Also on April 13, Robert Pattullo ("Pattullo")

[1] On April 13, 1983, the FSLIC as receiver and the newly created federally chartered Fidelity Savings & Loan ("Fidelity Federal") executed an "Acquisition Agreement," whereby they purchased virtually all of Fidelity's assets and assumed practically all of its liabilities. The following day, the FSLIC acquired all remaining assets and undertook to pay all remaining liabilities.

was named as the FSLIC's special representative to handle Fidelity's receivership. He promptly proceeded to terminate four employees. Among them was Meyer.

No reason was given Meyer for his termination, nor was he provided an opportunity either to hear the reasons why he should, or put forth the reasons why he should not, be terminated. In the same vein, he subsequently was denied the opportunity to appeal the decision or present evidence to challenge it.

Meyer's suit, filed against a number of defendants, grows out of these events. As of the time of trial, the sole remaining claim alleged that the FSLIC's and Pattullo's actions had deprived plaintiff of a property interest without due process of law, in violation of the Fifth Amendment.[2] The FSLIC's argument that it was protected by the doctrine of sovereign immunity having been rejected by the United States magistrate presiding over the trial,[3] the trial proceeded before a jury.

Subsequently, on September 28, 1982, the FSLIC in both its corporate and receivership capacities transferred the assets and liabilities of Fidelity Federal to Citicorp Bank, which in turn transferred the assets and liabilities to its wholly owned subsidiary, Citicorp Savings and Loan.

[2] On January 23, 1985, the district court issued an order dismissing a number of Meyer's claims, including his claim under the Fifth Amendment. However, on December 5, 1986, the court having reconsidered *sua sponte* its previous order, reinstated plaintiff's claim for deprivation of property without due process of law against the FSLIC and Pattullo.

[3] The trial was held before a magistrate pursuant to a stipulation and order entered February 16, 1989.

On September 19, 1989, the jury reached its decision pursuant to a special verdict. It found that Meyer had "a legitimate claim of entitlement to employment or a reasonable expectation of continued employment arising out of an implied contract with Fidelity;" that Meyer was "discharged . . . by the FSLIC and/or Robert L. Pattullo;" that the FSLIC and/or Pattullo "failed to provide John Meyer with a hearing, the reasons for his discharge, and an opportunity to contest the reasons for his discharge before his termination;" that Pattullo was "acting within the scope of his employment at the time he terminated plaintiff;" and that Meyer was "damaged as a result of the discharge." Upon instruction challenged by appellant, and after the court had rejected appellant's request that it allow expert testimony on the state of the law at the time of Meyer's termination, the jury also found Pattullo to be "immune from liability under the doctrine of qualified immunity."

The FSLIC timely appealed, arguing that Meyer's claims against the federal agency were barred by sovereign immunity. In the alternative, it disputes the conclusion that Meyer was deprived of a protected property interest. Meyer then filed a cross-appeal on the issue of Pattullo's qualified immunity.[4]

II.

The jurisdictional puzzle presented by this case consists of four principal pieces. First is the fundamental proposition that, "[a]bsent a waiver of sovereign immunity, the Federal Government is immune from suit." *Loeffler* v. *Frank*, 486 U.S. 549, 555, 108 S.Ct. 1965, 1969, 100 L.Ed.2d 549 (1987); see also *United States* v. *Testan*, 424 U.S. 392, 400, 96 S.Ct. 948, 954, 47 L.Ed.2d 114 (1976); *LaBarge* v. *County of Mariposa*, 798 F.2d 364, 366 (9th Cir.1986), *cert. denied*, 481 U.S. 1014, 107 S.Ct. 1889, 95 L.Ed.2d 497 (1987).

Second comes Congress' express provision that the FSLIC may "sue and be sued, complain and defend, in any court of competent jurisdiction in the United States." 12 U.S.C. § 1725(c)(4) (repealed 1989); *see also F.H.A.* v. *Burr*, 309 U.S. 242, 245, 60 S.Ct. 488, 490, 84 L.Ed. 724 (1939) (stating that "such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed"). We consistently have held that this "sue and be sued" language constitutes a general waiver of sovereign immunity. *Woodbridge Plaza* v. *Bank of Irvine*, 815 F.2d 538, 542-43 (9th Cir. 1987); *Morrison-Knudsen Co., Inc.* v. *Chg Intern., Inc.*, 811 F.2d 1209, 1223 (9th Cir.) ("Unless Congress clearly directs otherwise, such 'sue and be sued' language waives an agency's sovereign immunity"), *cert. dismissed*, 488 U.S. 935, 109 S.Ct. 358, 102 L.Ed.2d 349 (1987).

The third item is the FTCA, 28 U.S.C. §§ 1346(b), 2671-2680. The FTCA waives the United States' sovereign immunity from tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674; *see also*

[4] Although the Federal Deposit Insurance Corporation ("FDIC") is the statutory successor to the FSLIC, *see* 12 U.S.C. § 1821(a), this opinion refers to the FSLIC as it was the FSLIC's interest that was litigated throughout the suit.

Bush v. *Eagle-Picher Indus.*, 927 F.2d 445, 447 (9th Cir.1991).[5]

The fourth and final piece of the puzzle is the FTCA provision that states:

> The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title.

28 U.S.C. § 2679. Construing these four pieces together, our task can be expressed in the following question: Is a claim alleging deprivation of property without due process of law "cognizable" under the FTCA?

If the answer to this question is yes, the sue-and-be-sued clause has no effect on this case, *see* 28 U.S.C. § 2679(a), and Meyer's suit must be dismissed. Where the FTCA governs, its remedy is exclusive and a government agency may not be sued in its own name. *See Loeffler*, 486 U.S. at 549, 108 S. Ct. at 1966. The issue, then, simply becomes whether the FTCA waives the United States' sovereign immunity for the

[5] In addition, under the FTCA,

> (T)he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b).

particular tort at stake and whether the plaintiff has duly complied with the Act's requirements. Meyer's suit alleges a constitutional tort, which, by definition, is based on federal, not state, law. Because the FTCA restricts its waiver to injuries "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b), his claim would be barred.[6]

On the other hand, if the tort is *not* "cognizable" under the FTCA, then § 2679(a) has no application in this case and Meyer's suit is authorized by the broad waiver of sovereign immunity embodied in the sue-and-be-sued provision. *See Woodbridge Plaza*, 815 F.2d at 542-43; *Morrison-Knudsen*, 811 F.2d at 1223.

In deciding whether a claim is or is not cognizable, courts appear to have established three broad categories. First, claims brought against sue-and-be-sued agencies that clearly fall under the FTCA's coverage—that is, for which the FTCA provides a cause of action—are cognizable under section 1346(b). As a consequence, the remedy provided by the FTCA is exclusive. That result derives directly from section 2679(a) and the Supreme Court's opinion in *Loeffler*, where it stated:

> Congress expressly limited the waivers of sovereign immunity that it had previously effected through "sue-and-be-sued" clauses and stated that, in the context of suits for which it

[6] If this case is governed by the FTCA, other obstacles stand in Meyer's way. For instance, he would have had to bring his action against the United States and meet the administrative exhaustion requirements.

> provided a cause of action under the FTCA, "sue-and-be-sued" agencies would be subject to suit only to the same extent as agencies whose sovereign immunity from tort suits was being waived for the first time.

486 U.S. at 562, 108 S.Ct. at 1973.

Second, claims against sue-and-be-sued agencies that do not sound in tort, and therefore escape the FTCA's ambit, are unaffected by section 2679(a). That much is clear from *Loeffler*, in which the Supreme Court held that limitations on a sue-and-be-sued waiver of sovereign immunity must be "expressly" created by Congress. 486 U.S. at 561, 108 S.Ct. at 1972. The waiver of sovereign immunity, in sum, is left intact as to non-tort causes of action. *See also Woodbridge*, 815 F.2d at 543-44 (holding that where a claim is not "within the exclusive purview of the FTCA ... the 'sue-and-be-sued' provision" remains available to waive the agency's sovereign immunity) (citing *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512, 104 S.Ct. 2549, 81 L.Ed.2d 446 (1984)).

In the third hypothetical lies the real brain teaser. These are hybrid cases where the claim sounds in tort but is excluded from the FTCA's coverage. They fall into two subgroups: explicitly excluded claims, and implicitly excluded claims. The question in both instances is whether the fact that the FTCA does notprovide a remedy means that the action is not cognizable under the Act.

For actions controlled by an *explicit* exclusion, the answer is clear. Claims labeled "exceptions" by 28

U.S.C. § 2680 are one such example.[7] Such claims, which would appear to be embraced by the FTCA's definition of torts for which the government has waived its immunity but which are specifically excepted pursuant to section 2680, are not actionable. They are, however, deemed "cognizable" under the FTCA. *Safeway Portland Employees Fed. Credit Union* v. *FDIC*, 506 F.2d 1213, 1215 (9th Cir.1974). Therefore, pursuant to section 2679, a sue-and-be-sued clause would *not* waive an agency's immunity as to such actions.[8]

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[7] Thus, the FTCA "shall not apply to ... [a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter ... [a]ny claim for damages caused by the imposition or establishment of a quarantaine by the United States ... [a]ny claim arising in a foreign country ...." 28 U.S.C. § 2680(k).

[8] We find support for this position in a recent Supreme Court decision. At issue in *United States* v. *Smith*, — U.S. —, 111 S.Ct. 1180, 113 L.Ed.2d 134 (1991), was the interplay between the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("Liability Reform Act") and the FTCA. Under section 5 of the Liability Reform Act, "[t]he remedy against the United States" pursuant to the FTCA "is exclusive of any other civil action or proceeding for money damages ...." 28 U.S.C. § 2679(b)(1). In a sense, section 2679(b)(1) is thus the counterpart, as applied to federal employees, of section 2679's exclusivity provision directed at "sue-and-be-sued" agencies.

The problem in *Smith* was that the FTCA did not provide a remedy against the government because the alleged injury had occurred abroad and section 2680(k) of the FTCA specifically precludes recovery in such instances. The question, therefore, was "whether, by designating the FTCA as the 'exclusive remedy,' § 5 precludes an alternative method of recovery

The other, more difficult example concerns claims that sound in tort but are *implicitly* excluded from the FTCA's waiver of sovereign immunity. This is the case with torts for which state law would not impose liability on private persons, such as constitutional torts. Because "the constitutional tort is a child of federal law, the United States is not liable for such torts under the Federal Tort Claims Act." Bell, *Proposed Amendment to the Federal Tort Claims Act*, 16 Harv.J. on Legis. 1, 4 (1979); *see also Pereira* v. *United States Postal Service*, 899 F.2d 861, 864 (9th Cir.1990); *Keene Corp.* v. *United States*, 700 F.2d 836, 845 n. 13 (2d Cir.), *cert. denied*, 464 U.S. 864, 104 S. Ct. 195, 78 L.Ed.2d 171 (1983); *Birnbaum* v. *United States*, 588 F.2d 319, 322 (2d Cir.1978); Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281, 356. *See generally* Dolan, *Constitutional Torts and the Federal Tort Claims Act*, 14 U.Richmond L.Rev. 281 (1980). We conclude, for the reasons that follow, that constitutional torts, in addition to being implicitly excluded from the FTCA, are also not cognizable under that statute.

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against a government employee in cases where the FTCA itself does not provide a means of recovery." 111 S.Ct. at 1185.

Reversing our court's prior holding, the Supreme Court held that "§ 5 makes the FTCA the exclusive mode of recovery for the tort of a Government employee even when the FTCA itself precludes Government liability." *Id.* In reaching this decision, the Court relied on statutory language addressed to the federal employee prong of § 2679 that is absent from its federal agency equivalent. Indeed, section 2679(d)(4) expressly provides that suit "shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and *shall be subject to the limitations and exceptions applicable to those actions.*" 28 U.S.C. § 2679(d)(4) (emphasis added); *see also* 111 S.Ct. at 1185. Still, we are persuaded by the reasoning of the Supreme Court and by the holdings of various sister courts that suits predicated on tortious acts specifically excluded from the ambit of the FTCA cannot be brought against a federal agency, the existence of a sue-and-be-sued provision notwithstanding.

The Seventh Circuit's exchange on this issue is most illuminating. In *Baker* v. *F & F Investment Company*, 489 F.2d 829 (7th Cir. 1973), African-Americans brought a suit alleging violation of their Fifth and Thirteenth amendment rights by federal agencies, including the FSLIC. The defendants' argument that the FTCA applied and did not grant a remedy to the plaintiffs was characterized as both "elaborate" and "inherently suspect" by the court. *Id.* at 834-35. The Seventh Circuit proceeded to hold that subject matter jurisdiction existed for two reasons. First, addressing the issue of what we have called implicitly excluded claims, the court held:

> Plaintiffs' claim against these defendants is based on federal law. The complaint does not allege, and the federal defendants do not concede, that the United States, if a private person, would be liable to plaintiffs in accordance with Illinois law. Since the complaint is based exclusively on federal law, the FTCA is inapplicable . . . [T]he attempt to vindicate a right dependent, as here, upon federal statutes is not within the ambit of the FTCA.

Id. at 835.

Second, the court defeated the defendants' argument that the suit, being in reality a suit for tortious

interference with contractual rights, was explicitly barred by 28 U.S.C. § 2680(h).[9] The court simply replicated its prior reasoning, stating that if this were "really a suit for interference with contract rights, then the FTCA would 'not apply' and the sue and be sued clauses would not be limited by § 2679(a), and the pre-FTCA consent to sue would not be affected." *Id.* at 836. (citation omitted).

Six years later, the Seventh Circuit reconsidered its *Baker* decision in *FDIC* v. *Citizens Bank & Trust Co.*, 592 F.2d 364 (7th Cir.), *cert. denied*, 444 U.S. 829, 100 S.Ct. 56, 62 L.Ed.2d 37 (1979). That case involved a suit filed against the FDIC for a tort explicitly excluded from the FTCA; it did not involve any implicit exclusions. Reviewing decisions of other courts, the Seventh Circuit found that the FTCA "withdrew the sue-and-be-sued waiver of sovereign immunity" for explicitly excluded torts. *Id.* at 369. As most courts had ruled, even though a claim is labeled an exception under the FTCA, it nonetheless is "cognizable" for purposes of § 1346(b). *Id.* at 370; *see Safeway Portland*, 506 F.2d at 1215; *Edelman* v. *FHA*, 382 F.2d 594, 596-97 (2d Cir.1967). Therefore, it overruled *Baker* on this point.

However, *Citizens Bank* left undisturbed *Baker's* second prong, namely that "because the claim arose under federal law it was not within the ambit of the Act." 592 F.2d at 370. Indeed, it expressly distinguished the facts of the two cases, remarking that "the conduct alleged in *Baker* . . . was not the kind of conduct a private person (see § 1346(b)) would ever

[9] Section 2680(h) provides that the FTCA will not apply to "[a]ny claim arising out of . . . interference with contract rights."

have an opportunity to engage in, which suggests that Congress did not intend the Federal Tort Claims Act to apply." *Id.* at 370 n. 8. In sum, there is a difference, for purposes of "cognizability," between claims explicitly excepted by the FTCA and those implicitly excluded by virtue of the FTCA's own definition—that is, claims where no private person would be liable under the law of the state.[10] The former are "cognizable" under the FTCA, while the latter are not.

Support for this view can be found by comparing *Safeway Portland* with *First Empire Bank* v. *FDIC*, 572 F.2d 1361 (9th Cir.), *cert. denied*, 439 U.S. 919, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978). As mentioned above, in *Safeway Portland*, we found that torts explicitly excluded from the FTCA are "cognizable" under the statute. *Id.* at 1215 (quoting *Edelman*, 382 F.2d at 597). And yet, in *First Empire*, we held the FDIC liable on a claim based on federal law without even mentioning the immunity argument. As noted in *Federal Deposit*, short of surreptitiously overruling *Safeway Portland*, *First Empire* must stand for the position that "a tort claim arising under federal law is not subject to the Act." *Citizens Bank*, 592 F.2d at 372.

Language from a large number of courts corroborates this position. For example, in *Birnbaum*, plaintiffs brought suit alleging that the Central Intelligence Agency ("CIA") had unlawfully opened

[10] This distinction appears to have guided the district court in the instant case. Indeed, although the district court dismissed Meyer's state tort claims because they fell under two exceptions explicitly mentioned in section 2680 of the FTCA, he agreed to hear plaintiff's constitutional allegation.

letters from the Soviet Union. Besides discussing a number of causes of action cognizable under state law, the court scrupulously examined the claim alleging a constitutional violation:

> The District Court also held that the violation of plaintiffs' federal constitutional rights is a separate ground for liability under state law. We do not believe that the Federal Tort Claims Act comprehends *federal constitutional* torts in its reference to the "law of the place" under § 1346(b) . . . .
>
> Since Congress restricted the basis for liability under the Act to the 'law of the place,' we think that it would be a *tour de force* to consider direct violations of the federal constitution as "local law" torts.

588 F.2d at 327-28 (footnote omitted) (emphasis in original); *see also Keene*, 700 F.2d at 845 n. 13 (remarking that "*Bivens*-type actions against the United States are . . . routinely dismissed for lack of subject-matter jurisdiction"). These cases fortify the view that constitutional torts are not cognizable under the FTCA.

The FSLIC asserts that *Pereira* and its forebears[11] stand for the proposition that the sue-and-be-sued language does not waive its immunity for constitutional torts. In *Pereira*, plaintiff brought a First Amendment suit against the United States

[11] *McCollum* v. *Bolger*, 794 F.2d 602 (11th Cir.1986), *cert. denied*, 479 U.S. 1034, 107 S.Ct. 883, 93 L.Ed.2d 836 (1987); *Insurance Co. of N. Am.* v. *United States Postal Serv.*, 675 F.2d 756 (5th Cir.1982); *Contemporary Mission, Inc.* v. *United States Postal Serv.*, 648 F.2d 97 (2d Cir.1981).

Postal Service ("USPS"). 899 F.2d at 862. Holding that the Postal Service was immune from suit despite its sue-and-be-sued clause, we stated:

> The Federal Tort Claims Act . . . provides a waiver of sovereign immunity for tortious acts of an agency's employees only if such torts committed in the employ of a private person would have given rise to liability under state law. Therefore federal district courts have no jurisdiction over the United States where claims allege constitutional torts.
>
> The "sue and be sued" language of the Postal Service's charter should not be interpreted to enlarge the waiver of sovereign immunity specified by the FTCA . . . . [T]he Postal Service cannot be sued for constitutional torts . . .

Id. at 864.

We find *Pereira* inapposite for purposes of the instant case.[12] *Pereira*, as well as the three cases to which it cites on this issue, involved a claim against the (USPS). Like the FSLIC, the USPS is a sue-and-be-sued federal agency; unlike claims against the FSLIC, however, claims against the USPS are

[12] We note that a district court has cited *Pereira* on facts strikingly parallel to our own. In *Rush* v. *FDIC*, 747 F.Supp. 575 (N.D.Cal.1990), plaintiff brought a suit alleging in part that his termination by the FDIC constituted a deprivation of property without due process of law. *Id.* at 576. Dismissing this portion of the plaintiff's claim, the district court held *Pereira* to be dispositive. *Id.* at 579 (holding that "[s]ince plaintiff cannot allege a constitutional tort under the FTCA, the sovereign immunity of the United States and its agencies remains intact").

governed by 39 U.S.C. § 409(c).[13] Section 409(c) provides: "The provisions of chapter 171 and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service." Its import is to make the FTCA the sole possible avenue of relief for *all* torts committed by the USPS, whether or not the FTCA actually provides a remedy. In other words, section 409(c) has effectively read out tort actions from the general waiver of sovereign immunity embodied in the Postal Service's sue-and-be-sued clause. *See Pereira*, 899 F.2d at 863 (noting that the USPS's sue-and-be-sued waiver of sovereign immunity "is limited with respect to tort claims" by virtue of 39 U.S.C. § 409(c)).

Because the FTCA does not provide a remedy for constitutional torts, the United States has not waived its immunity for such torts when committed by the Postal Service. In light of this limitation on the sue-and-be-sued clause, we could not have found that language to have authorized a suit against the Postal Service for constitutional torts. Congress has enacted no such restriction on the general waiver of the FSLIC's immunity. For that reason, *Pereira* does not control this case.[14]

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[13] Section 409(c) was expressly invoked by all four courts. *See Pereira*, 899 F.2d at 863; *McCollum*, 794 F.2d at 608; *Insurance Co. of N. Am.*, 675 F. 2d at 758; *Contemporary Mission*, 648 F.2d at 104 n. 9.

[14] In fact, *Pereira* does not explicitly refer to section 2679 at all. It is also noteworthy that two of the cases cited by *Pereira* are simply inapposite. In *Insurance Co. of N.Am.*, the court affirmed the dismissal of plaintiff's claim that the Postal Service had negligently lost bags containing currency. 675

Nor are we persuaded by the FSLIC's argument that its interpretation best matches congressional intent. First, it cites Congress' wish to "place torts of 'suable' agencies of the United States upon precisely the same footing as torts of 'nonsuable' agencies." H.R.Rep. No. 1287, 79th Cong., 1st Sess., 6 (1945). Because the latter cannot be sued directly for constitutional torts, it argues, nor can the former.

Despite its force, the logic is not failproof. The Supreme Court case interpreting Congress' statement made it clear that "in the context of suits *for*

F.2d at 757. The court's holding thus stands for the unremarkable proposition that since plaintiff's claim was a strict common-law tort action, subject to the exceptions of the FTCA, and because section 2680(b) states that § 1346 does not apply to "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter," the suit was barred, notwithstanding the sue-and-be-sued clause. *Id.* at 758. The court never mentioned the issue of constitutional torts, nor need it have.

As for the second case, *Contemporary Mission*, the relevant portion of the opinion is limited to a footnote in which it is stated:

> [T]he district court correctly determined that it lacked subject matter jurisdiction over the claims against the United States Postal Service that were based upon certain postal officials' alleged interference with plaintiff's constitutional rights. The waiver of sovereign immunity contained in 28 U.S.C. § 1346(b) (1976) is limited to suits predicated upon a tort cause of action cognizable under state law.

648 F.2d at 104 n. 9. Bereft of any mention of the sue-and-be-sued clause, the statement simply echoes a familiar point, namely that constitutional torts are not embraced by the FTCA's waiver of sovereign immunity. *See supra* at 568.

which it provided a cause of action under the FTCA, 'sue-and-be-sued' agencies would be subject to suit only to the same extent as agencies whose sovereign immunity from tort suits was being waived for the first time." *Loeffler,* 486 U.S. at 562, 108 S.Ct. at 1973 (emphasis added). Congress, in sum, begged the very question raised by this case, namely whether constitutional torts are torts for which Congress "provided a cause of action under the FTCA." Hence, Meyer's view is equally consistent with legislative intent, leaving suable and nonsuable agencies on equal terms whenever, and to the extent that, the FTCA applies.

The FSLIC's second, more powerful retort is to point to the 1988 Liability Reform Act amending the FTCA. As outlined earlier, *see supra* note 8, section 2679 has two prongs: the first is addressed to sue-and-be-sued agencies, § 2679(a); the second to federal employees, § 2679(b). In relevant part, both purport to provide exclusive FTCA remedies against the United States.[15] However, under the amendment, Congress specifically held that federal employees were *not* immunized by section 2679(b) for civil actions "brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). The absence of a comparable restriction under section 2679(a) lends credence to the view that the Act also

[15] Section 2679(a) grants immunity to sue-and-be-sued agencies for claims cognizable under the Act; under section 2679(b), "[t]he remedy against the United States provided by Sections 1346(b) and 2672 of this title ... is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee ...."

precludes constitutional tort suits against sue-and-be-sued agencies.

However, we reject that argument. Besides the fact that interpreting the sounds of legislative silence remains an uncertain science, there is another way of reading Congress' action. As Justice Stevens points out in his *Smith* dissent, section 2679(b)(2)(A) is of questionable usefulness: "Congress did not need to add this amendment ... because ... constitutional torts are, for the most part, outside the realm of common-law torts," *Smith,* 111 S.Ct. at 1193 (Stevens, J., dissenting), and therefore unaffected by the FTCA or its amendments. As a result, it is at least arguable that its inclusion was meant as a reminder, an added guarantee made necessary by the amendment's potential ambiguity on this point.[16]

Moreover, other differences between Congress' treatment of actions against federal agencies and against federal employees should be noted. The provision addressing the former is remarkably suc-

[16] Legislative history is only faintly enlightening. In distinguishing between common law and constitutional torts, the House Committee Report simply explains:

> [T]he term "common law tort" embraces not only those state law causes of action predicated on the "common" or case law of the various states, but also encompasses traditional tort causes of action codified in state statutes that permit recovery for acts of negligence .... It is well established that the FTCA applies to such codified torts .... *A constitutional tort action, on the other hand,* is a vehicle by which an individual may redress an alleged violation of one or more fundamental rights embraced in the Constitution.

H.R.Rep. No. 100-700, p. 6 (1988) (emphasis added).

cinct. As we have seen, it does not mention that constitutional tort suits might still be viable against sue-and-be-sued agencies, *compare* 28 U.S.C. § 2679 (b)(2)(A); but, by the same token, neither does it mention the continued applicability of the FTCA's explicit limitations. *Compare* 28 U.S.C. § 2679(d)(4). It follows no more logically from the absence of the former that agencies are immune from constitutional tort claims than it does from the absence of the latter that they are *not* immune from tort suits expressly excepted under section 2680.

Accordingly, for the reasons set out above, we find that Meyer's action against the FSLIC alleging deprivation of property without due process of law is not barred by the doctrine of sovereign immunity.

The district court's ruling on this matter is affirmed.[17]

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[17] The district court's opinion is strengthened by a final observation. "Constitutional torts" is a convenient catch-phrase, but like all catch-phrases, neither particularly accurate, nor particularly helpful. Even if all torts—whether of constitutional or common law origin—were considered cognizable under the FTCA, there is a question whether all "constitutional torts" are properly understood as torts. As the Supreme Court has noted,

> In some cases, the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right.... In other cases, the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law of torts.

Carey v. *Piphus*, 435 U.S. 247, 258, 98 S.Ct. 1042, 1049, 55 L.Ed.2d 252 (1978). In the latter situation, it would seem incongruous to bar an action against a sue-and-be-sued agency

III.

We next address Meyer's claim that he was unconstitutionally deprived of his property interest without due process of law. We review this question de novo. *United States* v. *McConney*, 728 F.2d 1195,

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by invoking the FTCA when the underlying action was not a tort action at all.

Whether or not such be the case here is debatable. In *Owen* v. *City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), the Court first suggested that a constitutional claim arising out of a discharge without due process of law could be analogized to a common law action for breach of contract, *see id.* at 639 & n. 19, 100 S.Ct. at 1409 & n. 19, only to proceed to describe it as a tort action a few pages later. *See id.* at 642, 100 S.Ct. at 1411.

What we do know, however, is that the closest common law analogy to Meyer's claim is breach of an implied covenant of good faith and fair dealing, *see infra*, and that under California law, it is established that "tort remedies are not available for breach of the implied covenant in an employment contract to employees who allege they have been discharged in violation of the covenant." *Foley* v. *Interactive Data Corp.*, 47 Cal.3d 654, 700, 254 Cal.Rptr. 211, 239-40, 765 P.2d 373, 401-02 (1980). Rather, "contractual remedies should remain the sole available relief." *Id.* at 696, 254 Cal.Rptr. at 236, 765 P.2d at 398; *see also Mundy* v. *Household Finance Corp.*, 885 F.2d 542, 544 (9th Cir.1989); *Aalgaard* v. *Merchants Nat. Bank, Inc.*, 224 Cal.App.3d 674, 678 n. 1, 274 Cal.Rptr. 81, 82 n. 1 (1990). *Compare, e.g., Love v. United States*, 915 F.2d 1242, 1247 & n. 3, 1248 (9th Cir.1989) (finding that, under Montana law, the "implied covenant of good faith and fair dealing" is "recognize[d] as a separate cause of action in tort") (citing *Nicholson* v. *United Pacific Ins. Co.*, 219 Mont. 32, 710 P.2d 1342, 1348 (1985)). That Meyer's claim does not sound in tort under California law further discredits the invocation of the FTCA to bar his action.

1203 (9th Cir.) (en banc), *cert. denied,* 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

In *Board of Regents* v. *Roth,* 408 U.S. 564, 576-77, 92 S.Ct. 2701, 2708-09, 33 L.Ed.2d 548 (1972), and *Perry* v. *Sindermann,* 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972), the Supreme Court held that to have a property interest, an individual must possess an entitlement to the benefit. Entitlements are created not by the Constitution, but by "independent source(s) such as state law." 408 U.S. at 577, 92 S.Ct. at 2709. Relying on *Cleary* v. *American Airlines, Inc.,* 111 Cal.App.3d 443, 168 Cal.Rptr. 722 (1980), and *Pugh* v. *See's Candies, Inc.,* 116 Cal.App.3d 311, 171 Cal.Rptr. 917 (1981), the district court found that Meyer had stated a proper claim under state law for enjoyment of continued employment. *See also Foley,* 47 Cal.3d at 676-82, 254 Cal.Rptr. at 222-26, 765 P.2d at 384-88.[18] The terms and conditions of Meyer's employment that support his claim include his sixteen years of service for Fidelity, his frequent promotions and commendations and Fidelity's general policy of termination only upon a showing of good cause.

The FSLIC urges that, notwithstanding Fidelity's conduct, a contract for indefinite employment barring good cause was in excess of governing federal regulations. 12 C.F.R. § 563.39, in effect at the time of appellee's termination, provided that:

> An insured institution shall not enter into an employment contract with any of its officers or other employees if such contract would constitute an unsafe or unsound practice . . . [T]he making of such an employment contract would be an unsafe or unsound practice if such contract could lead to material financial loss or damage to the insured institution or could materially interfere with the exercise by the members of its board of directors of their duty of discretion provided by law, charter, bylaw or regulation as to the employment of an officer or employee of the institution. This may occur, depending upon the circumstances of the case, where an employment contract provides

[18] In *Cleary,* plaintiff had worked to the employer's satisfaction for 18 years. 111 Cal.App.3d at 447, 168 Cal.Rptr. at 724. The court stated that termination "of employment without legal cause after such a period of time offends the implied in law covenant of good faith and fair dealing contained in all contracts, including employment contracts." 111 Cal.App.3d at 455, 168 Cal.Rptr. at 729. In *Pugh,* the court found that some employers' conduct could give "rise to an implied promise that it would not act arbitrarily" in its dealing with employees. 116 Cal.App.3d at 329, 171 Cal.Rptr. at 927. In particular, the court looked at "the duration of [plaintiff's] employment, the commendations and promotions he received, the apparent lack of any direct criticism of his work, the assurances he was given, and the employer's acknowledged policies." *Id. See also Russell* v. *Mass. Mut. Life Ins. Co.,* 722 F.2d 482, 492 n. 10 (9th Cir.1983), *rev'd on other grounds,* 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985). In *Foley,* the California Supreme Court disapproved of *Cleary's* holding "to the extent that [it] permit[s] a cause of action seeking tort remedies for breach of the implied covenant." 47 Cal.3d at 700 n.42, 254 Cal.Rptr. at 240 n. 42, 765 P.2d at 401; *see also supra* at note 18. However, the type of remedy available has no bearing on the issue whether Meyer enjoyed a reasonable expectation of continued employment. *Foley* itself makes this pellucidly clear by relying extensively on *Pugh* and, specifically, on the factors the court deemed critical in that case to find an implied promise. 47 Cal.3d at 676-82, 254 Cal.Rptr. at 222-26, 765 P.2d at 384-88.

for an excessive term, or does not contain an appropriate termination for cause provision.

Cf. United States v. *Gaubert*, — U.S. —, 111 S.Ct. 1267, 1277, 113 L.Ed.2d 335 (1991) (describing the FSLIC's "broad statutory authority"). The FSLIC's argu-ment is that by virtue of 12 C.F.R. § 563.39, Meyer never enjoyed a property interest in continued employment. Because a guarantee of continued employment would be inconsistent with section 563.39, it follows that it must be considered non-enforceable.

As support for its position, the FSLIC invokes *Inglis* v. *Feinerman*, 701 F. 2d 97 (9th Cir.1983), *cert. denied*, 464 U.S. 1040, 79 L.Ed.2d 168 (1984), and *Bollow* v. *Federal Reserve Bank*, 650 F.2d 1093 (9th Cir. 1981), *cert. denied*, 455 U.S. 948, 102 S.Ct. 1449, 71 L.Ed.2d 662 (1982). In both cases, plaintiffs asserted that their employment contracts gave rise to property interests that were unconstitutionally terminated. *Inglis*, 701 F.2d at 99; *Bollow*, 650 F.2d at 1096. The court disagreed. In *Inglis*, the employer was a federal bank created under the Federal Home Loan Bank Act, 12 U.S.C. § 1421 *et seq.*, 701 F.2d at 98; in *Bollow*, it was a federal reserve bank governed by the Federal Reserve Act of 1913, 12 U.S.C. § 341, Fifth. 650 F.2d at 1097. The two relevant statutes gave the employer the power "to dismiss at pleasure" officers and employees. *Inglis*, 701 F.2d at 98; *Bollow*, 650 F.2d at 1097. Despite allegations that the bank's overall conduct and communications amounted to a promise of continued employment, the court held such purported pledges to be void and nonenforceable in light of inconsistent and controlling federal statutes. 701 F.2d at 98; 650 F.2d at 1099-100. *See also Aalgaard*, 224 Cal.App.3d 674, 274 Cal.Rptr. 81 (con-

struing in similar fashion the National Banking Act, 12 U.S.C. § 24, Fifth).

Although the analogy is seductive, it ultimately must fail. To begin with, there is no equivalent "dismissal at pleasure" language in the instant case. It is one thing to have a federal statute that grants banks the power to terminate employment contracts at will, quite another to forbid insured associations from entering into burdensome or unsafe contracts. Where the former clearly collides with a "for cause" provision, the latter, at most, qualifies it. As Meyer remarks, it is perfectly plausible that a contract contemplating dismissal only for good cause would not "constitute an unsafe or unsound practice" under 12 C.F.R. § 563.39.

More importantly, the cases cited by the FSLIC all involve federal banks created under federal statutes. Here, although governed in part by federal law, the employer was a state-chartered savings institution. Federal law, which somehow "preempted" state law claims, *see Inglis*, 701 F.2d at 98 (explaining that *Bollow* "construed [12 U.S.C. § 341 (Fifth)] as preempting employee claims of wrongful discharge based on state law"); *Aalgaard*, 224 Cal.App.3d 674, 274 Cal.Rptr. at 92 (finding that 12 U.S.C. § 24, Fifth preempted California law), does not preempt Meyer's action—nor indeed does the FSLIC claim that it does. In short, the contract allegedly created between Fidelity and Meyer cannot be voided on this ground.

The FSLIC directs its second set of arguments to the particularities of receivership law. First, it points to the broad power granted by Congress to federal receivers, citing their responsibility "to proceed to liquidate its assets in an orderly manner,

whichever shall appear to be to the best interests of the insured members of the association in default." 12 U.S.C. § 1729(b) (repealed 1989). To compel the FSLIC to conduct a hearing before exercising its authority would, it is argued, be inconsistent with congressional intent.

Second, the FSLIC contends that its actions also are expressly permitted under California law because it incorporates applicable federal law. Indeed, California Financial Code § 9103 (repealed 1983), provides that a state receiver, "shall have all the rights, privileges and powers conferred upon it by federal statutes now or hereafter enacted." *See Fidelity Savings & Loan Ass'n* v. *Federal Home Loan Bank Board,* 689 F.2d 803, 810 (9th Cir.1982) (stating that under this provision, "California law thus incorporates all federal law concerning the powers of the FSLIC as receiver"), *cert. denied,* 461 U.S. 914, 103 S.Ct. 1893, 77 L.Ed.2d 283 (1983).

Once again, the FSLIC's argument is appealing. Stated somewhat differently, the contention is that Meyer's purported entitlement to continued employment was, from its very inception, defined conditionally, limited by the prospect of Fidelity's placement in receivership. With the implicit promise came the implied caveat.

Ultimately, however, this reasoning also is flawed. The source of Meyer's property right was California common law, a history of satisfactory employment, and an understanding of fair dealing. The fact that federal and, arguably, state law conferred wide discretion to receivers to repudiate "burdensome" contracts does not, retrospectively, annul the state entitlement. In *FDIC* v. *Mallen,* 486 U.S. 230, 108

S.Ct. 1780, 100 L.Ed.2d 265 (1988), for example, the president and director of a federally insured bank was indicted on a number of charges. *Id.* at 236, 108 S.Ct. at 1785. As a result, the FDIC suspended him pursuant to 12 U.S.C. § 1818(g)(1), which authorizes precisely such action. *Id.* at 237-38, 108 S.Ct. at 1786-87. Reading the case through the FSLIC's eyes, one would be tempted to say that there had been no deprivation of a property interest, since the interest itself was contingent upon the plaintiff not being indicted—in other words, the president's entitlement to continued employment could not survive his indictment, for that would be inconsistent with the FDIC's right to dismiss under federal regulations.

The Court, however, saw it differently. Without hesitation, it found that the plaintiff's right to continue as president was "protected by the Fifth Amendment Due Process Clause," and that "the FDIC's order of suspension affected a deprivation of this property interest." *Id.* at 240, 108 S.Ct. at 1787.[19] That the suspension was foretold made it no less of a deprivation.[20]

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[19] In *Mallen,* of course, the statute did in fact give the suspended officer the right to a post-suspension hearing. It should be noted, however, that the right was given only after an initial statute that permitted suspension without a hearing had been ruled unconstitutional. *Id.* at 234, 108 S.Ct. at 1784. The point, simply, is that the existence of a provision allowing for termination or suspension in the event some occurrence were to take place does not simultaneously redefine the property interest at stake. Indictment did not trigger an interruption of constitutional protection; neither should receivership.

[20] Likewise, in ruling that a state-created entitlement to education meant that students could not be suspended on

Undoubtedly, federal receivership law reflects the urgency of the situation facing savings and loan institutions. The right given receivers to dispose expeditiously of burdensome contracts is an outgrowth of this emergency; but the weight of the federal interest goes to the question of *what*, not *whether*, process is due. The facts alleged in this case suggest that the FSLIC arbitrarily terminated some employees while retaining others. Meyer, for his part, was never given an opportunity to hear or be heard, and it was never determined—at least not openly—that keeping *him* aboard would somehow destabilize the entire crew. At a minimum, Meyer "must be given *some* kind of notice and afforded *some* kind of hearing"—"rudimentary precautions" guaranteed by the due process clause. *Goss*, 419 U.S. at 579, 581, 95 S.Ct. at 738, 740 (emphasis in original). Accordingly, we affirm the district court on this point.

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grounds of misconduct without due process, the Court in *Goss* v. *Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), was unmoved by the existence of a state law permitting such action. In particular, the Court rejected the dissent's reasoning, reminiscent of the FSLIC's in this case:

> The Ohio statute that creates the right to a "free" education also explicitly authorizes a principal to suspend a student for as much as 10 days. Thus the very legislation which "defines" the "dimension" of the student's entitlement, while providing a right to education generally, does not establish this right free of discipline imposed in accord with Ohio law.

419 U.S. at 586-87, 95 S.Ct. at 742-43 (Powell, J., dissenting) (citation omitted).

IV.

Meyer also brought a *Bivens* action against Pattullo stemming from the alleged violation of plaintiff's Fifth Amendment rights. *See Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). While the FTCA presents no bar to Meyer's *Bivens* action, he faces a different kind of obstacle in his suit against Pattullo. An official in Pattullo's position is entitled to qualified immunity when his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); *see also Finkelstein* v.*Bergna*, 924 F.2d 1449, 1451 (9th Cir.1991); *Thorsted* v. *Kelly*, 858 F.2d 571, 573 (9th Cir.1988). Thus, "[t]he relevant inquiry is whether a reasonable government official could have believed that his conduct was lawful, in light of clearly established law and the information he possessed." *Thorsted*, 858 F.2d at 573 (citing *Anderson* v. *Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)).

In this case, after having received instructions from the court that were challenged by the plaintiff, the jury returned a verdict in favor of Pattullo on the grounds of qualified immunity. The court's instructions were as follows:

> The law provides government officials, such as the defendant, Robert Pattullo, with a defense of alleged violation of federal constitution and statutory law which is known as qualified immunity . . . .

The defendant, Robert Pattullo, is entitled to the defense and has asserted the defense of qualified immunity if he can establish by a preponderance of the evidence that a reasonable government official confronted with similar circumstances in this case could have been believed [sic] that his actions were lawful.

In determining whether a defendant, such as Robert Pattullo, is entitled to the defense of qualified immunity, you must consider whether the defendant could have reasonably believed that his actions were lawful in light of the defendants' official duties, the character of his official position, the facts of which he was aware, and the events which confronted him.

The reasonableness of the defendant Pattullo's belief is determined by the reasonable person's standard. It is not what the defendant Pattullo subjectively believed, but whether his belief that his actions in terminating the plaintiff were reasonable when judged by professional standards.

We begin, uncharacteristically, with substantial agreement: neither party disputes that the jury was improperly instructed. In light of controlling precedent, a proper instruction should refer *both* to the factors enumerated in this case *and* to "clearly established law." *See, e.g., Thorsted*, 858 F.2d at 573. The district court rejected plaintiff's and defendants' proposed instructions, both of which met this re-

quirement; clearly, it was in error.[21] This, however, does not end the inquiry.

As we recently noted, the trial court has wide latitude in formulating instructions and will be reviewed for abuse of discretion only. *Benigni* v. *City of Hemet*, 879 F.2d 473, 479 (9th Cir. 1988); *Thorsted*, 858 F. 2d at 573. The reviewing court must determine "whether, considering the charge as a whole, the court's instructions fairly and adequately covered the issues presented, correctly stated the law, and were not misleading." *Thorsted*, 858 F.2d at 312. An error of instruction will not be reversed "if it is more probably than not harmless." *Benigni*, 879 F.2d at 479; *see also Kisor* v. *Johns-Mansville Corp.*, 783 F.2d 1337, 1340 (9th Cir. 1986) ("We must consider whether the instruction . . . [is] to the prejudice of the objecting party").

We conclude that the error in this case was non-prejudicial based on our finding that, as a matter of law, " 'the facts alleged . . . [do not] support a claim of violation of clearly established law.' " *Vaughan* v. *Ricketts*, 859 F.2d 736, 739 (9th Cir.1988) (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 528 n. 9, 105 S.Ct. 2806, 2816 n. 9, 86 L.Ed.2d 411 (1985)), *cert. denied*, 490 U.S. 1012, 109 S.Ct. 1655, 104 L.Ed.2d 169 (1989). Although we believe Meyer's claim has merit, *see*

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[21] Arguably, the district court's decision to submit the question of qualified immunity to the jury means that it "necessarily found that the legal rules were clearly established in this area." *Brady* v. *Gebbie*, 859 F.2d 1543, 1556 (9th Cir. 1988), *cert. denied*, 489 U.S. 1100, 109 S.Ct. 1577, 103 L.Ed.2d 943 (1989). The court's conviction is not the issue, however; rather, it is the propriety of its explanation of the law to the jurors.

supra Part III, "a reasonable officer . . . could have believed his actions toward (Meyer) were constitutional even if they were not." *Wood* v. *Ostrander*, 879 F.2d 583, 591 (9th Cir.1989), *cert. denied*, — U.S. —, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990).[22]

Rules governing federally insured institutions and federal receivership make for treacherous law.

[22] It will not suffice to say, as plaintiff does, that *Roth* and *Perry* had clearly established the applicable law some 19 years ago. The heart of the problem, no doubt, lies in the "level of generality at which the relevant 'legal rule' is to be identified." *Anderson*, 483 U.S. at 639, 107 S.Ct. at 3038-39; see also *Schlegel* v. *Bebout*, 841 F.2d 937, 944 (9th Cir. 1988). As the level narrows, so too diminishes the likelihood that the official will be vulnerable to suit. Predictably, Meyer chooses to define the legal rule in as broad a manner as possible, evoking the right not to "be deprived of a constitutionally protected property interest until and unless he is afforded a due process hearing." Conversely, and just as predictably, Pattullo focuses on the narrowest possible definition, describing "FSLIC's termination of employees of a failed financial institution pursuant to takeover or liquidation" and "federal receivership law."

Because we find that a federal employee could reasonably have believed in the lawfulness of the actions at issue, we need not decide between these conflicting definitions. Still, we are mindful of the Supreme Court's admonition that

> the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right . . . . But if a test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*.

Anderson, 483 U.S. at 639, 107 S.Ct. at 3039.

Indeed, the district court went so far as to reverse itself, initially finding that Meyer did not have a legitimate expectation of continued employment. In order to be clearly established,

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 640, 107 S.Ct. at 3039 (citation omitted); *see also F.E. Trotter, Inc.* v. *Watkins*, 869 F.2d 1312, 1315 (9th Cir.1989); *Brady*, 859 F.2d at 1556. In light of the complex nature of Meyer's entitlement, reflected in both the district court's and our own examination of the issue, we are unable to say that *Anderson's* standard has been met. The issue of qualified immunity should not have been submitted to the jury because Pattullo violated no *clearly established law. See Schwartzman* v. *Valenzuela*, 846 F.2d 1209, 1211 (9th Cir.1988) (question of clearly established right is question of law). Thus, any error in the qualified immunity instruction was harmless.

V.

Finally, Meyer contends that the district court erred by excluding expert testimony regarding the state of the law. A court's decision to exclude evidence is reviewed for abuse of discretion. *Ignacio* v. *People of the Territory of Guam*, 413 F.2d 513, 520

(9th Cir. 1969), *cert. denied*, 397 U.S. 943, 90 S.Ct. 959, 25 L.Ed.2d 124 (1970).

On numerous past occasions, this court has "condemned the practice of attempting to introduce law as evidence." *United States* v. *Unruh*, 855 F.2d 1363, 1376 (9th Cir. 1987), *cert. denied*, 488 U.S. 974, 109 S.Ct. 513, 102 L. Ed.2d 548 (1988). Indeed, "[i]t is not for witnesses to instruct the jury as to applicable principles of law, but for the judge." *Marx & Co., Inc.* v. *Diners' Club, Inc.*, 550 F.2d 505, 509-10 (2d Cir.), *cert denied*, 434 U.S. 861, 98 S.Ct. 188, 54 L.Ed.2d 134 (1977). If judges are advised to reject expert testimony on legal matters, surely it cannot be reversible error when they do so.

CONCLUSION

There are, essentially, two threshold matters in this case: the first is the FSLIC's immunity, and the second, Pattullo's. For the foregoing reasons, the district court's disposition on both issues is hereby

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-16695 and No. 90-15025
USDC No. CV 83-2204-JPV

JOHN H. MEYER, PLAINTIFF/APPELLANT
CROSS-APPELLEE

v.

FIDELITY SAVINGS, ET AL. DEFENDANTS
AND FEDERAL SAVINGS
AND
LOAN INSURANCE CORPORATION,
DEFENDANT-APPELLEE/CROSS-APPELLANT

[Filed June 29, 1992]

ORDER

BEFORE: TANG, FARRIS, AND D.W. NELSON, CIRCUIT JUDGES

The members of this panel that decided this case voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has

requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

STATUTORY PROVISIONS

1. 28 U.S.C. 1346(b) provides:

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. 28 U.S.C. 2679(a) provides:

The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

3. 28 U.S.C. 2680 provides, in pertinent part:

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or

not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

4. 12 U.S.C. 1725(c) (1982) provided, in pertinent part:

On June 27, 1934, the [Federal Savings and Loan Insurance] Corporation shall become a body corporate, and shall be an instrumentality of the United States, and as such shall have power—

* * * * *

(4) To sue and be sued, complain and defend, in any court of competent jurisdiction in the United States or its Territories or possessions or the Commonwealth of Puerto Rico, and may be served by serving a copy of process on any of its agents or any agent of the Federal Home Loan Bank Board and mailing a copy of such process by registered mail or by certified mail to the Corporation at Washington, District of Columbia.

(2)

No. 92-741

In The

Supreme Court of the United States

October Term, 1992

FEDERAL DEPOSIT INSURANCE CORPORATION,

Petitioner,

v.

JOHN H. MEYER, ET AL.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Counsel of Record on behalf of Respondent, John H. Meyer, ("Meyer") files this Opposition to Petitioner's ("FDIC's") Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutory and constitutional provisions cited in the petition, there are two regulations

involved in the case: 12 C.F.R. § 569a.6(c) and 12 C.F.R. §§ 569a.8(a) and (b). These regulations, as in effect on April 13, 1982, are set forth in Appendix B, *infra.*, 33a and 34a.

STATEMENT OF THE CASE

The following additional facts are necessary to correct inaccuracies or omissions in the statement set forth in the petition:

1. The thrift institution of which Meyer was an officer (Fidelity Savings and Loan ("Fidelity")) experienced severe financial difficulties but never became insolvent prior to when it was placed under federal receivership. Supp. C.A. Rec. Exc. 89 [On March 31, 1982, 14 days prior to the federal receivership, Fidelity had a net worth of $19,600,000.00].

2. The authority relied upon by the Federal Savings and Loan Insurance Corporation ("FSLIC"), and its special representative, Robert Pattullo ("Pattullo"), to terminate Meyer's employment was that granted to FSLIC by 12 C.F.R. § 569a.6(c) (App., *infra.*, 33a), which permitted the receiver to "reject or repudiate any lease or contract which it considers burdensome . . . ". 12 C.F.R. § 563.39, in effect at the time of Meyer's termination did not, as stated in the petition, define "any employment contract for an 'excessive term' as a forbidden 'unsafe and unsound practice' " (Pet., p. 7). Rather, that regulation provided that "[t]he making of [] an employment contract would be an unsafe or unsound practice if such contract would lead to material financial loss or damage to the

insured institution or could materially interfere with the exercise by the members of its board of directors of their duty of discretion"; something that "may occur, depending on the circumstances of the case, where an employment contract provides for an excessive term, or does not contain an appropriate termination for cause provision". App., *infra.*, 23a-24a.

3. Neither before nor after Pattullo terminated Meyer was Meyer given the reasons for his termination, nor an opportunity to indicate why he should not be terminated, nor notification of any right to object to his termination, nor an opportunity to present evidence as to why the decision to terminate him should be changed. Supp. C.A. Rec. Exc. 90-91. Meyer was also denied the opportunity to appeal the decision or present evidence to challenge it in any subsequent proceeding. App., *infra.*, 3a.

4. After appointing FSLIC as receiver of Fidelity, the Federal Home Loan Bank Board ("FHLBB") created a new thrift institution, Fidelity Federal Savings and Loan of San Francisco. Most of the assets and liabilities of Fidelity were transferred to this new institution which was eventually sold to Citicorp Corporation. Supp. C.A. Rec. Exc. 90. The receiver did not transfer to Citicorp any liabilities of Fidelity as to Meyer, including any claim for wrongful termination to the extent such liabilities existed. *Id.* By virtue of the various transactions occurring after the seizure, FSLIC assumed and undertook to pay and discharge valid liabilities, if any, arising out of Meyer's employment with or termination from Fidelity. C.A. Supp. Rec. Exc. 91.

5. At no time did the receiver publish a notice as required by 12 C.F.R. § 569.a8 or otherwise establish a claims procedure to allow creditors to present claims to the receiver arising out of dealings with Fidelity or the seizure and receivership. C.A. Supp. Rec. Exc. 56-57.

SUMMARY OF ARGUMENT

The court of appeal's decision is not in conflict with other circuits, the decisions of this Court or with any Congressional scheme. This case involves the interplay between the Federal Tort Claims Act (FTCA) and the FSLIC's "sue and be sued" clause, both of which can operate as waivers of sovereign immunity for a federal agency. Meyer's claim is not "cognizable" under the FTCA since the FTCA applies only to wrongs which would result in liability to a private person under local law. Meyer's claim is implicitly excluded from this definition because it asserts a violation of the federal constitution, rather than local law, and a violation which would not create liability for a private individual. Thus there is no waiver of sovereign immunity for Meyer's claim in the FTCA, but at the same time the FTCA would not foreclose such a waiver if found elsewhere, ie, in the sue-and-be-sued clause relevant to FSLIC.

The sue-and-be-sued clause relevant to FSLIC does provide such a waiver as it should be interpreted broadly where, as here, such a broad interpretation: (1) would not be inconsistent with any statutory or constitutional scheme, (2) would not gravely interfere with any governmental function and (3) would not be inconsistent with a

plain Congressional purpose to use the sue-and-be-sued clause in a narrow sense.

There are no special factors counselling hesitation such as those identified in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and its progeny. The court of appeals decision only indirectly impacts on federal fiscal policy in the same way as any indemnified *Bivens* claim against an individual federal agent.

Meyer's due process rights were clearly violated when his property interest in continued employment was taken without even the most minimal elements of due process. While FSLIC had a broad mandate to manage thrift institutions in receivership, and this included the power to repudiate burdensome employment contracts, a requirement of due process was implied in the regulations implementing that mandate.

The court of appeals decision does not threaten a dramatic interference with the nation's efforts to deal with troubled financial institutions. Rather, the court of appeals correctly preserves a fundamental value of the American constitutional democracy; an individual's right to some due process prior to deprivation of property even in the face of urgent governmental action.

REASONS FOR DENYING THE PETITION

The issue of sovereign immunity is important to, and has received substantial attention by Congress and this Court. Despite a significant body of law, however, there are inevitably fact situations that have yet to be fully addressed. This case presents one such circumstance:

where a *Bivens* claim is made against a sue-and-be-sued federal agency. In resolving the issues presented the court of appeals carefully applied existing precedent. The result is a ruling which does not disturb any Congressional scheme or decision of this Court. There is no compelling reason for review by the Court.

This Court has made it clear that where Congressional legislation or Executive regulation authorize deprivation of liberty or property, they must ordinarily provide for at least a minimal level of due process. The urgency of the circumstances in which government action takes place goes to *what*, rather than *whether* process is due. It is undisputed that at least prior to the seizure of Fidelity Meyer had a protected property interest in continued employment and that he did not receive even the most minimal elements of due process; that is, notice and a hearing of some kind. Again on this point, the court of appeals applied established precedent of this Court and there are no special or important reasons for review.

1. The interplay between two Congressional waivers of sovereign immunity is the critical issue in the court of appeals opinion. First, Congress provided for a limited waiver of sovereign immunity in the FTCA, 28 U.S.C. §§ 1346(b),2671-80. (Relevant portions reprinted at Pet., p. 37a.) Second, Congress provided a more general waiver of sovereign immunity as to actions against the FSLIC; providing at 12 U.S.C. § 1725(c)(4) (Pet., pp. 38a-39a)[1] that FSLIC may "sue and be sued, complain and

[1] 12 U.S.C. § 1725(c)(4) was repealed in 1989 but it was in effect at all relevant times to this action.

defend, in any court of competent jurisdiction in the United States". The court of appeals was correct in ruling that since Meyer's claim was not "cognizable" under the FTCA, and because the sue-and-be-sued clause must be broadly construed as a general waiver of sovereign immunity, Meyer's claim against FSLIC is not barred. This ruling is consistent with *Bivens;* there are no special factors counselling hesitation that would dictate a different result. The potential fiscal impact on the United States is similar to the impact when a government agent is sued under *Bivens* and given indemnity by the government.

a. In its petition, FDIC relies on a circular argument: that the FTCA is the exclusive waiver of sovereign immunity as to torts and because Meyer's claim is a tort, the FTCA is the only avenue available for him to find a waiver. This ignores the evident difference between common law torts and constitutional torts. *See, e.g., United States v. Smith,* 499 U.S. ___, 113 L.Ed.2d 134, 144-145 (1991) and separate opinion by Justice Stevens at 113 L.Ed.2d 152-155, n.4 and n.5. The court of appeals points out that Congress has provided a more sound basis to interpret the interplay between the FTCA and the sue-and-be-sued clause. Sue-and-be-sued clauses are not to be construed as a waiver of sovereign immunity for those claims that are "cognizable" under 28 U.S.C. § 1346(b). And claims are "cognizable" under § 1346(b) if the conduct complained of would result in liability to a private person under local state law. Since the conduct complained of here – failure to provide due process with respect to a deprivation of property – would not result in liability to a private person under local law, it is not

cognizable under the FTCA and the general waiver of the sue-and-be-sued clause provides a basis for suit.

The two cases claimed by FDIC to conflict with the court of appeals are in fact distinguishable. *Peak v. SBA*, 660 F.2d 375 (8th Cir. 1981) does not deal with a *Bivens* claim, i.e., a claim which would not make a private individual liable under state law. *Ascot Dinner Theatre, Ltd v. SBA*, 887 F.2d 1024 (10th Cir. 1989) does not consider the question which is at the heart of the court of appeals ruling: whether a *Bivens* action would be cognizable under the FTCA. Likewise, the cases which FDIC claims are "in substantial tension" with this case, *Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 97, 105 (2d Cir. 1981); *McCollum v. Bolger*, 794 F.2d 602 (11th Cir. 1986); and *Periera v. United States Postal Service*, 899 F.2d 861 (9th Cir.1990), modified, 942 F.2d 577 (1991) and 964 F.2d 873 (1992), were specifically distinguished by the court of appeals on the ground of differences in the statutes under which the Postal Service was created as compared to the statutes creating FSLIC. Further, while the court of appeals did not note it, in those cases there were other statutes or regulations providing relief whereas here there is no relief for Meyer other than through this lawsuit. As noted below, the existence, or lack, of alternative mechanisms for remediation of constitutional violations is a factor consistently relied upon by this Court in considering the appropriateness of *Bivens* relief.

b. FDIC urges a narrow construction of the sue-and-be-sued clause, but this Court has dictated a broad interpretation that finds such clauses to waive immunity unless (1) the suit in question is "not consistent with the

statutory or constitutional scheme", (2) "an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function", or (3) "for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense". *Federal Housing Administration v. Burr*, 309 U.S. 242, 245 (1940); *cited*, approvingly by, *Loeffler v. Frank*, 486 U.S. 549, 554-555 (1988); *see*, also, *Franchise Tax Board of California v. U.S.P.S.*, 467 U.S. 512, 514 (1984); *Woodbridge Plaza v. Bank of Irvine*, 815 F.2d 538 (9th Cir. 1987); *Morrison-Knudson Co. Inc. v. CHG Intern., Inc.*, 811 F.2d 1209, 1223 (9th Cir. 1987). No showing can be made here that the sue-and-be-sued language in § 1725(c)(4) should be read narrowly.

FDIC argues that the Congressional scheme here involved is the FTCA and "that the FTCA provides the exclusive damage remedy for claims that a federal agency caused tortious injury". Pet., p. 10. However, as the court of appeals points out, by its defining language 28 U.S.C. § 1346(b) only includes as torts those wrongs which would subject a private citizen to liability under local law. App., *infra.*, 16a. *Bivens* actions are implicitly excluded from this definition because state law would not impose liability on private citizens for constitutional wrongs. App., *infra.*, 10a.

No grave interference with the performance of a governmental function would result from a rule that required FSLIC to afford constitutional protection when a property interest is taken. Indeed, as pointed out by the court of appeals, the constitution compels some due process and the question of interference with governmental functions ultimately turns on *what*, rather than *whether*

process is due. App., *infra.*, 27a. This is consistent with the Court's ruling on which Meyer's constitutional claim is based, *Board of Regents v. Roth*, 408 U.S. 564, 569, n. 7 (1972) [A person must be afforded an opportunity for some kind of hearing prior to a constitutional deprivation except in emergency situations, and even in emergency situations, the person is entitled to a post-deprivation hearing]. *See*, also, *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971).

c. Contrary to FDIC's argument, the court of appeals opinion allowing a *Bivens* action against a sue-and-be-sued agency was not "misguided and unsettling". Pet., p. 18. In *Bivens*, the Court emphasized that damages are often the only remedy for constitutional violations. That is certainly true here. More importantly, FDIC misinterprets the holdings of the Court, in *Bivens* and its progeny, on the availability of a right of action, absent express statute, and the nature and effect of "special factors counselling hesitation".

The pivotal ruling in *Bivens* is that damages for constitutional violations can be permitted even though no statute provides for them. *Carlson v. Green*, 446 U.S. 14, 18 (1980); *Chappell v. Wallace*, 462 U.S. 296 (1983). Dictum in *Bivens* inferred that such a remedy might not be available under two circumstances: (1) where there are "special factors counselling hesitation in the absence of affirmative action by Congress", or (2) "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective". *Carlson*, 446 U.S. at 18-19, citing *Bivens*, 403 U.S. at 396; *see*, also, *United States v. Stanley*, 483 U.S. 669,

678 (1987); *Chappell, supra*, 462 U.S. at 298. Special factors counselling hesitation have included a comprehensive congressional scheme to regulate military life (*Chappell, supra;* and *Stanley, supra*), a comprehensive system regulating government employment (*Bush v. Lucas*, 462 U.S. 367 (1983)), and an administrative structure and procedures regulating social security that "are of a size and extent difficult to comprehend" (*Schweiker v. Chilicky*, 487 U.S. 412, 424 (1988), citing, *Richardson v. Perales*, 402 U.S. 389, 399 (1971). In each of these cases adequate alternative remedies had been provided for persons claiming constitutional violations:

> In sum, the concept of "special factors counselling hesitation in the absence of affirmative action by Congress" has proved to include an appropriate judicial deference to indications that Congressional inaction has not been inadvertent. When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies. *Schweiker*, 487 U.S. at 423.

No such mechanism for remediation of constitutional violations was provided in the statutory or regulatory scheme under which Fidelity was seized and Meyer terminated.

FDIC notes that in *Bivens* itself the dictum counselling hesitation also mentioned the possible impact of

recovery on "federal fiscal policy". This factor as a limiting matter is not persuasive where, as here, the *Bivens* remedy is asserted against an independent federal agency rather than the United States itself. *Bivens* remedies are allowed against federal agents, despite the fact that the agents are commonly provided indemnity for such claims by the government. See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 641, n. 3 (1987); 28 C.F.R. § 50.15(c). While it is true that these indemnity rights are not absolute, nevertheless, a *Bivens* claim that is covered by indemnity thus indirectly impacts on "federal fiscal policy". The impact on federal fiscal policy of a *Bivens* action against a sue-and-be-sued agency is much the same; indirect and not absolute. Agencies such as FDIC have budgets and experience operating successes and failures that only indirectly impact on federal fiscal policy. The impact of *Bivens* liability on such an institution no more directly effects federal fiscal policy than myriad other judicial rulings that sue-and-be-sued agencies must face, and this impact no more directly effects fiscal policy than the indemnified *Bivens* recovery against an individual federal agent.

2. FDIC's assertion that when FSLIC was appointed as receiver "a sea change occurred in [Fidelity's] legal and contractual relationships" (Pet., p. 21) is superficially relied upon to prove too much. Clearly, FSLIC had broad powers to manage the affairs of the institution in receivership and this included the power to repudiate contracts. However, in repudiating contracts, where constitutional rights were implicated, FSLIC was required to act in a fashion consistent with constitutional protections, including Meyer's right to due process.

a. FDIC does not apparently dispute two important matters: (1) That at least prior to the seizure of Fidelity, Meyer had a protected property interest in continued employment under *Board of Regents v. Roth*, 408 U.S. 564 (1972), and relevant California law as described by the court of appeals (App., *infra*, 20a-27a); and (2) That Meyer never received even the most minimal level of due process prior to his termination. FDIC's argument, rather, is that with the seizure and federal receivership came a "sea change" that substantially altered or invalidated prior commercial relationships. Pet., p. 21.

Neither Meyer nor the court of appeals dispute that FSLIC had broad authority to manage the affairs of Fidelity after its seizure. This included the power to "reject or repudiate any lease or contract which it consider[ed] burdensome." 12 C.F.R. § 569a.6 (as in effect on April 13, 1982). App., *infra*, 33a. The regulation itself does not provide for due process. However, for more than seventy-five years, and as recently as 1991, this Court has consistently held that Congressional legislation and Executive directives that authorize deprivations of liberty or property must ordinarily provide for due process and where they are silent the right of impacted individuals to notice and a meaningful opportunity to be heard will be implied. *Burns v. United States*, 501 U.S. ___, 115 L.Ed.2d 123 (1991); *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *The Japanese Immigrant Case*, 189 U.S. 86 (1903). As noted in *Burns*, the "Court has likewise inferred other statutory protections essential to assuring procedural fairness." *Id.*, citing, *Kent v. United States*, 383 U.S. 541, 557 (1966) [right to adversary representation in juvenile transfer proceedings]; *Greene v. McElroy*, 360 U.S. 474,

495-508 (1959) [right to confront adverse witnesses in security clearance revocation hearing]; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-51 (1950) [right to formal hearing in deportation proceedings]. Meyer does not claim that his employment could not have been terminated in the sound discretion of the FSLIC and its receiver. Meyer does claim, however, that he was entitled to due process; that is, to an opportunity to be heard and explain why he should not be terminated.

FDIC's assertion that Meyer's due process is limited to submission of a claim (Pet., pp. 23-25) is disingenuous to say the least as it is based upon a critical misstatement of fact. The claim procedure that might otherwise have given Meyer some right to relief was never instituted in the subject seizure.[2] As FDIC knows, this action is the only vehicle that Meyer has ever had to seek redress for the violation of his constitutional rights.

3. The court of appeals decision does not threaten a "dramatic interference with this nation's efforts to deal with failed financial institutions." Pet., p. 25. The importance of FDIC's (and, previously, FSLIC's) task is not disputed. But even critical tasks of the government are required to be completed in a manner that preserves constitutional protections. Requiring some level of due process prior to property deprivations is not unreasonable and is constitutionally compelled.

"At its core, the right to due process reflects a fundamental value in our American constitutional system". *Boddie v. Connecticut, supra*, 401 U.S. at 374. As acknowledged by the court of appeals, the federal receiver was operating in a difficult context. However, the urgency of the circumstances goes properly to *what* process was due rather than *whether* process is due. At a minimum, Meyer was entitled to " . . . *some* kind of notice and [to be] afforded *some* kind of hearing" – "rudimentary precautions" guaranteed by due process. *Goss v. Lopez*, 419 U.S. 565, 579-581 (1975) (Emphasis in original); *see*, also, *Board of Regents v. Roth, supra*, 408 U.S. at 570, n. 7 [before a

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[2] The claim procedure contemplated in regulations at the time was found at 12 C.F.R. § 569a.8, (App., *infra*, 33a). It provided for a notice, the creation of forms for presenting claims, and various other procedures. However, with reference to the Fidelity receivership, the notice was never published, the forms were never prepared and an opportunity to present claims was never provided to Meyer or anyone else. This, despite the fact that by virtue of the various transactions occurring after the seizure, FSLIC assumed and undertook to pay and discharge valid liabilities, if any, arising out of Meyer's employment with or termination from Fidelity. Pet. p. 4; C.A. Supp. Rec. Exc. 91.

FSLIC also asserted to the district court that Meyer should have made a claim. However, because no evidence was presented to the district court that a claim procedure was ever instituted or made available to Meyer, the court ruled that FSLIC would be estopped from further making this claim in the action. C.A. Supp. Rec. Exc. 56-57.

Thus FLSIC/FDIC's assertions as to Meyer's supposed right to present a claim takes on an Alice-in-Wonderland aura. FSLIC contractually agreed to pay and discharge valid liabilities arising out of Meyer's termination, then failed to provide any forum for Meyer to submit a claim, and, finally, in the context of litigation, it is claimed that Meyer should have submitted a claim, but only through the nonexistent claims procedure.

The mythical opportunity to submit a claim has never existed.

person suffers a deprivation of a protected property interest he or she is entitled to some kind of a hearing unless there is an extraordinary emergency in which case the person is entitled to a post-deprivation hearing].

Meyer was never afforded *any* notice or hearing, before or after his protected interest in his employment was taken from him. He received no due process in violation of constitutional guarantees.

The court of appeals decision reflects our tradition of ensuring some level of due process in all governmental deprivations. FDIC has made no showing that this would gravely interfere with its admittedly important functions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GENNARO A. FILICE III
Counsel of Record For Respondent

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 89-16695, 90-15025

JOHN H. MEYER, PLAINTIFF/APPELLANT
CROSS-APPELLEE

v.

FIDELITY SAVINGS, ET AL., DEFENDANTS
AND
FEDERAL SAVINGS AND LOAN INSURANCE
CORPORATION, DEFENDANT-APPELLEE/
CROSS-APPELLANT

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

[Filed Apr. 5, 1991]

BEFORE TANG, FARRIS AND D.W. NELSON, CIRCUIT JUDGES

OPINION

D.W. NELSON, Circuit Judge:

With the enactment of the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), §§ 2671-80, Congress partially punctured the immunity of the sovereign. At the same time, however, it limited the relief available against parties other that the government by making the United States the exclusive defendant in various situations. This case presents one of the numberless questions arising out of this interplay: Whether a suit predicated on the tortious deprivation of fifth amendment due process, and

therefore arguably beyond the reach of the FTCA, may nonetheless be brought against the FSLIC pursuant to a "sue-and-be-sued" clause. We hold that it may.

I.

In 1966, plaintiff John Meyer ("Meyer") joined Fidelity Savings & Loan ("Fidelity"), where he remained for the ensuing sixteen years. By 1982, at the time he was terminated, he had reached the position of executive vice-president. That same year, as a result of dubious loan policies, Fidelity began experiencing severe financial difficulties. They finally came to a head on April 13, 1983, when California's Savings and Loan Commissioner seized Fidelity's assets and appointed the Federal Savings & Loan Corporation ("FSLIC") as state receiver. Because the FSLIC was later appointed the sole federal receiver by the Federal Home Loan Bank Board pursuant to 12 U.S.C. § 1729(c)(2), federal receivership replaced state receivership by operation of law.[1] Also on April 13, Robert Pattullo ("Pattullo") was named as the FSLIC's special

[1] On April 13, 1983, the FSLIC as receiver and the newly created federally chartered Fidelity Savings & Loan ("Fidelity Federal") executed an "Acquisition Agreement," whereby they purchased virtually all of Fidelity's assets and assumed practically all of its liabilities. The following day, the FSLIC acquired all remaining assets and undertook to pay all remaining liabilities.

Subsequently, on September 28, 1982, the FSLIC in both its corporate and receivership capacities transferred the assets and liabilities of Fidelity Federal to Citicorp Bank, which in turn transferred the assets and liabilities to its wholly owned subsidiary, Citicorp Savings and Loan.

representative to handle Fidelity's receivership. He promptly proceeded to terminate four employees. Among them was Meyer.

No reason was given Meyer for his termination, nor was he provided an opportunity either to hear the reasons why he should, or put forth the reasons why he should not be terminated. In the same vein, he subsequently was denied the opportunity to appeal the decision or present evidence to challenge it.

Meyer's suit, filed against a number of defendants, grows out of these events. As of the time of trial, the sole remaining claim alleged that the FSLIC's and Pattullo's actions had deprived plaintiff of a property interest without due process of law, in violation of the Fifth Amendment.[2] The FSLIC's argument that it was protected by the doctrine of sovereign immunity having been rejected by the United States magistrate presiding over the trial,[3] the trial proceeded before a jury.

On September 19, 1989, the jury reached its decision pursuant to a special verdict. It found that Meyer had "a legitimate claim of entitlement to employment or a reasonable expectation of continued employment arising out of an implied contract with Fidelity;" that Meyer was

[2] On January 23, 1985, the district court issued an order dismissing a number of Meyer's claims, including his claim under the Fifth Amendment. However, on December 5, 1986, the court having reconsidered *sua sponte* its previous order, reinstated plaintiff's claim for deprivation of property without due process of law against the FSLIC and Pattullo.

[3] The trial was held before a magistrate pursuant to a stipulation and order entered February 16, 1989.

"discharged . . . by the FSLIC and/or Robert L. Pattullo;" that the FSLIC and/or Pattullo "failed to provide John Meyer with a hearing, the reasons for his discharge, and an opportunity to contest the reasons for his discharge before his termination;" that Pattullo was "acting within the scope of his employment at the time he terminated plaintiff;" and that Meyer was "damaged as a result of the discharge." Upon instruction challenged by appellant, and after the court had rejected appellant's request that it allow expert testimony on the state of the law at the time of Meyer's termination, the jury also found Pattullo to be "immune from liability under the doctrine of qualified immunity."

The FSLIC timely appealed, arguing that Meyer's claims against the federal agency were barred by sovereign immunity. In the alternative, it disputes the conclusion that Meyer was deprived of a protected property interest. Meyer then filed a cross-appeal on the issue of Pattullo's qualified immunity.[4]

II.

The jurisdictional puzzle presented by this case consists of four principal pieces. First is the fundamental proposition that, "[a]bsent a waiver of sovereign immunity, the Federal Government is immune from suit." *Loeffler v. Frank*, 486 U.S. 549, 555 (1987); *see also United States v. Testa*, 424 U.S. 392, 400 (1976); *LaBarge v. County of*

[4] Although the Federal Deposit Insurance corporation ("FDIC") is the statutory successor to the FSLIC, *see* 12 U.S.C. § 1821 (a), this opinion refers to the FSLIC as it was the FSLIC's interest that was litigated throughout the suit.

Mariposa, 798 F.2d 364, 366 (9th Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987).

Second comes Congress' express provision that the FSLIC may "sue and be sued, complain and defend, in any court of competent jurisdiction in the United States" 12 U.S.C. § 1725(c)(4) (repealed 1989); *see also F.H.A. v. Burr*, 309 U.S. 242, 245 (1939) (stating that "such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed"). We consistently have held that this "sue and be sued" language constitutes a general waiver of sovereign immunity. *Woodbridge Plaza v. Bank of Irvine*, 815 F.2d 538, 542-43 (9th Cir. 1987); *Morrison-Knudsen Co., Inc. v. Chg Intern., Inc.*, 811 F.2d 1209, 1223 (9th Cir.) ("Unless Congress clearly directs otherwise, such 'sue and be sued' language waives an agency's sovereign immunity"), *cert. dismissed*, 488 U.S. 935 (1987).

The third item is the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346 (b), §§ 2671-2680. The FTCA waives the United States' sovereign immunity from tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674; *see also Bush v. Eagle-Picher Indus.*, 927 F.2d 445, 447 (9th Cir. 1991)[5]

[5] In addition, under the FTCA,

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if

The fourth and final piece of the puzzle is the FTCA provision that states:

> The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title.

28 U.S.C. § 2679. Construing these four pieces together, our task can be expressed in the following question: Is a claim alleging deprivation of property without due process of law "cognizable" under the FTCA?

If the answer to this question is yes, the sue-and-be-sued clause has no effect on this case, *see* 28 U.S.C. § 2679(a), and Meyer's suit must be dismissed. Where the FTCA governs, its remedy is exclusive and a government agency may not be sued in its own name. *See Loeffler*, 486 U.S. at 549. The issue, then, simply becomes whether the FTCA waives the United States' sovereign immunity for the particular tort at stake and whether the plaintiff has duly complied with the Act's requirements. Meyer's suit alleges a constitutional tort, which, by definition, is based on federal, not state, law. Because the FTCA restricts its waiver to injuries "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or

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> a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b).

omission occurred," 28 U.S.C. § 1346(b), his claim would be barred.[6]

On the other hand, if the tort is *not* "cognizable" under the FTCA, then § 2679(a) has no application in this case and Meyer's suit is authorized by the broad waiver of sovereign immunity embodied in the sue-and-be-sued provision. *See Woodbridge Plaza*, 815 F.2d at 542-43; *Morrison-Knudsen*, 811 F.2d at 1223.

In deciding whether a claim is or is not cognizable, courts appear to have established three broad categories. First, claims brought against sue-and-be-sued agencies that clearly fall under the FTCA's coverage–that is, for which the FTCA provides a cause of action–are cognizable under section 1346(b). As a consequence, the remedy provided by the FTCA is exclusive. That result derives directly from section 2679(a) and the Supreme Court's opinion in *Loeffler*, where it stated:

> Congress expressly limited the waivers of sovereign immunity that it had previously effected through "sue-and-be-sued" clauses and stated that, in the context of suits for which it provided a cause of action under the FTCA, "sue-and-be-sued" agencies would be subject to suit only to the same extent as agencies whose sovereign immunity from tort suits was being waived for the first time.

486 U.S. at 562.

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[6] If this case is governed by the FTCA, other obstacles stand in Meyer's way. For instance, he would have had to bring his action against the United States and meet the administrative exhaustion requirements.

Second, claims against sue-and-be-sued agencies that do not sound in tort, and therefore escape the FTCA's ambit, are unaffected by section 2679(a). That much is clear from *Loeffler*, in which the Supreme Court held that limitations on a sue-and-be-sued waiver of sovereign immunity must be "expressly" created by Congress. 486 U.S. at 561. The waiver of sovereign immunity, in sum, is left intact as to non-tort causes of action. *See also Woodbridge*, 815 F.2d at 543-44 (holding that where a claim is not "within the exclusive purview of the FTCA . . . the 'sue-and-be-sued' provision" remains available to waive the agency's sovereign immunity) (citing *Franchise Tax Board v. United States Postal Service*, 467 U.S. 512 (1984)).

In the third hypothetical lies the real brain teaser. These are hybrid cases where the claim sounds in tort but is excluded from the FTCA's coverage. They fall into two subgroups: explicitly excluded claims, and implicitly excluded claims. The question in both instances is whether the fact that the FTCA does not provide a remedy means that the action is not cognizable under the Act.

For actions controlled by an *explicit* exclusion, the answer is clear. Claims labeled "exceptions" by 28 U.S.C. § 2680 are one such example.[7] Such claims, which would appear to be embraced by the FTCA's definition of torts for which the government has waived its immunity but

[7] Thus, the FTCA "shall not apply to . . . [a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter . . . [a]ny claim for damages caused by the imposition or establishment of a quarantine by the United States . . . [a]ny claim arising in a foreign county. . . . " 28 U.S.C. § 2680(k).

which are specifically excepted pursuant to section 2680, are not actionable. They are, however, deemed "cognizable" under the FTCA. *Safeway Portland Employees Fed. Credit Union v. FDIC*, 506 F.2d 1213, 1215 (9th Cir. 1974). Therefore, pursuant to section 2679, a sue-and-be-sued clause would *not* waive an agency's immunity as to such actions.[8]

[8] We find support for this position in a recent Supreme Court decision. At issue in *United States v. Smith*, 111 S. Ct. 1180 (1991), was the interplay between the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Liability Reform Act) and the FTCA. Under section 5 of the Liability Reform Act, "[t]he remedy against the United States" pursuant to the FTCA "is exclusive of any other civil action or proceeding for money damages. . . . " 28 U.S.C. § 2679(b)(1). In a sense, section 2679(b)(1) is thus the counterpart, as applied to federal employees, of section 2679's exclusivity provision directed at "sue-and-be-sued" agencies.

The problem in *Smith* was that the FTCA did not provide a remedy against the government because the alleged injury had occurred abroad and section 2680(k) of the FTCA specifically precludes recovery in such instances. The question, therefore, was "whether, by designating the FTCA as the 'exclusive remedy,' § 5 precludes an alternative method of recovery against a government employee in cases where the FTCA itself does not provide a means of recovery." 111 S. Ct. at 1185.

Reversing our court's prior holding, the Supreme Court held that "§ 5 makes the FTCA the exclusive mode of recovery for the tort of a Government employee even when the FTCA itself precludes Government liability." *Id.* In reaching this decision, the Court relied on statutory language addressed to the federal employee prong of § 2679 that is absent from its federal agency equivalent. Indeed, section 2679 (d)(4) expressly provides that suit "shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and *shall be subject to the limitations and exceptions applicable to those actions.*" 28 U.S.C. § 2679(d)(4) (emphasis

The other, more difficult example, concerns claims that sound in tort but are *implicitly* excluded from the FTCA's waiver of sovereign immunity. This is the case with torts for which state law would not impose liability on private persons, such as constitutional torts. Because "the constitutional tort is a child of federal law, the United States is not liable for such torts under the Federal Tort Claims Act." Bell, *Proposed Amendment to the Federal Tort Claims Act*, 16 **Harv J. on Legis.** 1, 4 (1979); *see also Pereira v. U.S. Postal Service*, 899 F.2d 861, 864 (9th Cir. 1990); *Keene Corp. v. United States*, 700 F.2d 836, 845 n.13 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983); *Birnbaum v. United States*, 588 F.2d 319, 322 (2d Cir. 1978); Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 **Sup. Ct. Rev.** 281, 356. *See generally* Dolan, *Constitutional Torts and the Federal Tort Claims Act*, 14 **U. Richmond L. Rev.** 281 (1980). We conclude, for the reasons that follow, that constitutional torts, in addition to being implicitly excluded from the FTCA, are also not cognizable under that statute.

The Seventh Circuit's exchange on this issue is most illuminating. In *Baker v. F & F Investment Company*, 489 F.2d 829 (7th Cir. 1973), African-Americans brought a suit alleging violation of their Fifth and Thirteenth amendment rights by federal agencies, including the FSLIC. The defendants' argument that the FTCA applied and did not

added); *see also* 111 S. Ct. at 1185. Still, we are persuaded by the reasoning of the Supreme Court and by the holdings of various sister courts that suits predicated on tortious acts specifically excluded from the ambit of the FTCA cannot be brought against a federal agency, the existence of a sue-and-be-sued provision notwithstanding.

grant a remedy to the plaintiffs was characterized as both "elaborate" and "inherently suspect" by the court. *Id.* at 834-35. The Seventh Circuit proceeded to hold that subject matter jurisdiction existed for two reasons. First, addressing the issue of what we have called implicitly excluded claims, the court held:

> Plaintiffs' claim against these defendants is based on federal law. The complaint does not allege, and the federal defendants do not concede, that the United States, if a private person, would be liable to plaintiffs in accordance with Illinois law. Since the complaint is based exclusively on federal law, the FTCA is inapplicable . . . [T]he attempt to vindicate a right dependent, as here, upon federal statutes is not within the ambit of the FTCA.

Id. at 835.

Second, the court defeated the defendants' argument that the suit, being in reality a suit for tortious interference with contractual rights, was explicitly barred by 28 U.S.C. § 2680(h).[9] The court simply replicated its prior reasoning, stating that if this were "really a suit for interference with contract rights, then the FTCA would 'not apply' and the sue and be sued clauses would not be limited by § 2679(a), and the pre-FTCA consent to sue would not be affected." *Id.* at 836.

Six years later, the Seventh Circuit reconsidered its *Baker* decision in *FDIC v. Citizens Bank & Trust Co.*, 592 F.2d 364 (7th Cir.), *cert. denied*, 444 U.S. 829 (1979). That

[9] Section 2680(h) provides that the FTCA will not apply to "[a]ny claim arising out of . . . interference with contract rights."

case involved a suit filed against the FDIC for a tort explicitly excluded from the FTCA; it did not involve any implicit exclusions. Reviewing decisions of other courts, the Seventh Circuit found that the FTCA "withdrew the sue-and-be-sued waiver of sovereign immunity" for explicitly excluded torts. *Id.* at 369. As most courts had ruled, even though a claim is labeled an exception under the FTCA, it nonetheless is "cognizable" for purposes of § 1346(b). *Id.* at 370; *see Safeway Portland,* 506 F.2d at 1215; *Edelman v. FHA,* 382 F.2d 594, 596-97 (2d Cir. 1967). Therefore, it overruled *Baker* on this point.

However, *Citizens Bank* left undisturbed *Baker's* second prong, namely that "because the claim arose under federal law it was not within the ambit of the Act." 592 F.2d at 370. Indeed, it expressly distinguished the facts of the two cases, remarking that "the conduct alleged in *Baker* . . . was not the kind of conduct a private person (see § 1346(b)) would ever have an opportunity to engage in, which suggests that Congress did not intend the Federal Tort Claims Act to apply." *Id.* at 370 n.8. In sum, there is a difference, for purposes of "cognizability," between claims explicitly excepted by the FTCA and those implicitly excluded by virtue of the FTCA's own definition – that is, claims where no private person would be liable under the law of the state.[10] The former are "cognizable" under the FTCA, while the latter are not.

[10] This distinction appears to have guided the district court in the instant case. Indeed, although the district court dismissed Meyer's state tort claims because they fell under two exceptions explicitly mentioned in section 2680 of the FTCA, he agreed to hear plaintiff's constitutional allegation.

Support for this view can be found by comparing *Safeway Portland* with *First Empire Bank v. FDIC,* 572 F.2d 1361 (9th Cir.), *cert. denied,* 439 U.S. 919 (1978). As mentioned above, in *Safeway Portland,* we found that torts explicitly excluded from the FTCA are "cognizable" under the statute. *Id.* at 1215 (quoting *Edelman,* 382 F.2d at 597). And yet, in *First Empire,* we held the FDIC liable on a claim based on federal law without even mentioning the immunity argument. As noted in *Federal Deposit,* short of surreptitiously overruling *Safeway Portland, First Empire* must stand for the position that "a tort claim arising under federal law is not subject to the Act." *Federal Deposit,* 592 F.2d at 372.

Language from a large number of courts corroborates this position. For example, in *Birnbaum,* plaintiffs brought suit alleging that the Central Intelligence Agency ("CIA") had unlawfully opened letters from the Soviet Union. Besides discussing a number of causes of action cognizable under state law, the court scrupulously examined the claim alleging a constitutional violation:

> The District Court also held that the violation of plaintiffs' federal constitutional rights is a separate ground for liability under state law. We do not believe that the Federal Tort Claims Act comprehends *federal constitutional* torts in its reference to the "law of the place" under § 1346(b). . . .
>
> Since Congress restricted the basis for liability under the Act to the 'law of the place,' we think that it would be a *tour de force* to consider direct violations of the federal constitution as "local law" torts.

588 F.2d at 327-28 (footnote omitted) (emphasis in original; *see also Keene*, 700 F.2d at 845 n.13 (remarking that "*Bivens*-type actions against the United States are . . . routinely dismissed for lack of subject-matter jurisdiction"). These cases fortify the view that constitutional torts are not cognizable under the FTCA.

The FSLIC asserts that *Pereira* and its forebears[11] stand for the proposition that the sue-and-be-sued language does not waive its immunity for constitutional torts. In *Pereira*, plaintiff brought a First Amendment suit against the United States Postal Service. 899 F.2d at 862. Holding that the Postal Service was immune from suit despite its sue-and-be-sued clause, we stated:

> The Federal Tort Claims Act . . . provides a waiver of sovereign immunity for tortious acts of an agency's employees only if such torts committed in the employ of a private person would have given rise to liability under state law. Therefore federal district courts have no jurisdiction over the United States where claims allege constitutional torts.
>
> The "sued and be sued" language of the Postal Service's charter should not be interpreted to enlarge the waiver of sovereign immunity specified by the FTCA. . . . [T]he Postal Service cannot be sued for constitutional torts . . .

Id. at 864.

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[11] *McCollum v. Bolger*, 794 F.2d 602 (11th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987); *Insurance Co. of N. Am. v. United States Postal Serv.*, 675 F.2d 756 (5th Cir. 1982); *Contemporary Mission, Inc. v. United States Postal Serv.*, 648 F.2d 97 (2d Cir. 1981).

We find *Pereira* inapposite for purposes of the instant case.[12] *Pereira*, as well as the three cases to which it cites on this issue, involved a claim against the United States Postal Service ("USPS"). Like the FSLIC, the USPS is a sue-and-be-sued federal agency; unlike claims against the FSLIC, however, claims against the USPS are governed by 39 U.S.C. § 409(c).[13] Section 409(c) provides: "The provisions of chapter 171 and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service." Its import is to make the FTCA the sole possible avenue of relief for *all* torts committed by the USPS, whether or not the FTCA actually provides a remedy. In other words, section 409(c) has effectively read out tort actions from the general waiver of sovereign immunity embodied in the Postal Service's sue-and-be-sued clause. *See Pereira*, 899 F.2d at 863 (noting that the USPS's sue-and-be-sued waiver of sovereign immunity "is limited with respect to tort claims" by virtue of 39 U.S.C. § 409(c)).

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[12] We note that a district court has cited *Pereira* on facts strikingly parallel to our own. In *Rush v. FDIC*, 747 F.Supp. 575 (N.D.Cal. 1990), plaintiff brought a suit alleging in part that his termination by the FDIC constituted a deprivation of property without due process of law. *Id.* at 576. Dismissing this portion of the plaintiff's claim, the district court held *Pereira* to be dispositive. *Id.* at 579 (holding that "[s]ince plaintiff cannot allege a constitutional tort under the FTCA, the sovereign immunity of the United States and its agencies remains intact").

[13] Section 409(c) was expressly invoked by all four courts. *See Pereira*, 899 F.2d at 863; *McCollum*, 794 F.2d at 608; *Insurance Co. of N. Am.*, 675 F.2d at 758; *Contemporary Mission*, 648 F.2d at 104 n.9.

Because the FTCA does not provide a remedy for constitutional torts, the United States has not waived its immunity for such torts when committed by the Postal Service. In light of this limitation on the sue-and-be-sued clause, we could not have found that language to have authorized a suit against the Postal Service for constitutional torts. Congress has enacted no such restriction on the general waiver of the FSLIC's immunity. For that reason, *Pereira* does not control this case.[14]

[14] In fact, *Pereira* does not explicitly refer to section 2679 at all. It is also noteworthy that two of the cases cited by *Pereira* are simply inapposite. In *Insurance Co.*, the court affirmed the dismissal of plaintiff's claim that the Postal Service had negligently lost bags containing currency. 675 F.2d at 757. The court's holding thus stands for the unremarkable proposition that since plaintiff's claim was a strict common-law tort action, subject to the exceptions of the FTCA, and because section 2680(b) states that § 1346 does not apply to "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter," the suit was barred, notwithstanding the sue-and-be-sued clause. *Id.* at 758. The court never mentioned the issue of constitutional torts, nor need it have.
As for the second case, *Contemporary Mission*, the relevant portion of the opinion is limited to a footnote in which it is stated:

> [T]he district court correctly determined that it lacked subject matter jurisdiction over the claims against the United States Postal Service that were based upon certain postal officials' alleged interference with plaintiff's constitutional rights. The waiver of sovereign immunity contained in 28 U.S.C. § 1346(b) (1976) is limited to suits predicated upon a tort cause of action cognizable under state law.

648 F.2d at 104 n.9. Bereft of any mention of the sue-and-be-sued clause, the statement simply echoes a familiar point, namely that constitutional torts are not embraced by the FTCA's waiver of sovereign immunity. *See supra* at 9.

Nor are we persuaded by the FSLIC's argument that its interpretation best matches congressional intent. First, it cites Congress' wish to "place torts of 'suable' agencies of the United States upon precisely the same footing as torts of 'non-suable' agencies." H.R. Rep. No. 1287, 79th Cong., 1st Sess., 6 (1945). Because the latter cannot be sued directly for constitutional torts, it argues, nor can the former.

Despite its force, the logic is not failproof. The Supreme Court case interpreting Congress' statement made it clear that "in the context of suits *for which it provided a cause of action under the FTCA*, 'sue-and-be-sued' agencies would be subject to suit only to the same extent as agencies whose sovereign immunity from tort suits was being waived for the first time." *Loeffler*, 486 U.S. at 562 (emphasis added). Congress, in sum, begged the very question raised by this case, namely whether constitutional torts are torts for which Congress "provided a cause of action under the FTCA." Hence, Meyer's view is equally consistent with legislative intent, leaving suable and nonsuable agencies on equal terms whenever, and to the extent that, the FTCA applies.

The FSLIC's second, more powerful retort is to point to the 1988 Liability Reform Act amending the FTCA. As outlined earlier, *see supra* note 8, Section 2679 has two prongs: the first is addressed to sue-and-be-sued agencies, § 2679(a); the second to federal employees, § 2679(b). In relevant part, both purport to provide exclusive FTCA

remedies against the United States.[15] However, under the amendment, Congress specifically held that federal employees were *not* immunized by section 2679(b) for civil actions "brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). The absence of a comparable restriction under section 2679(a) lends credence to the view that the Act also precludes constitutional tort suits against sue-and-be-sued agencies.

However, we reject that argument. Besides the fact that interpreting the sounds of legislative silence remains an uncertain science, there is another way of reading Congress' action. As Justice Stevens points out in his *Smith* dissent, section 2679(b)(2)(A) is of questionable usefulness: "Congress did not need to add this amendment . . . because . . . constitutional torts are, for the most part, outside the realm of common-law torts," *Smith, supra,* 111 S. Ct. at 1193 (Stevens, J., dissenting), and therefore unaffected by the FTCA or its amendments. As a result, it is at least arguable that its inclusion was meant as a reminder, an added guarantee made necessary by the amendment's potential ambiguity on this point.[16]

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[15] Section 2679(a) grants immunity to sue-and-be-sued agencies for claims cognizable under the Act; under section 2679(b), "[t]he remedy against the United States provided by Sections 1346(b) and 2672 of this title . . . is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee. . . . "

[16] Legislative history is only faintly enlightening. In distinguishing between common law and constitutional torts, the House Committee Report simply explains:

> [T]he term "common law tort" embraces not only those state law causes of action predicated on the "common" or case law of the various states, but also encompasses traditional tort causes of action codified in state statutes that permit recovery for acts of negligence. . . . It is well established that the FTCA applies to such codified torts. . . . *A constitutional tort action, on the other hand,* is a vehicle by which an individual may redress an alleged violation of one or more fundamental rights embraced in the Constitution.

H.R.Rep. No 100-700, p.6 (1988) (emphasis added).

Moreover, other differences between Congress' treatment of actions against federal agencies and against federal employees should be noted. The provision addressing the former is remarkably succinct. As we have seen, it does not mention that constitutional tort suits might still be viable against sue-and-be-sued agencies, *compare* 28 U.S.C. § 2679(b)(2)(A); but, by the same token, neither does it mention the continued applicability of the FTCA's explicit limitations. *Compare* 28 U.S.C. § 2679(d)(4). It follows no more logically from the absence of the former that agencies are immune from constitutional tort claims than it does from the absence of the latter that they are *not* immune from tort suits expressly excepted under section 2680.

Accordingly, for the reasons set out above, we find that Meyer's action against the FSLIC alleging deprivation of property without due process of law is not barred by the doctrine of sovereign immunity. The district court's ruling on this matter is affirmed.[17]

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[17] The district court's opinion is strengthened by a final observation. "Constitutional torts" is a convenient catch-phrase, but like all catch-phrases, neither particularly accurate, nor particularly helpful. Even if all torts–whether of constitutional or common law origin–were considered cognizable under the FTCA, there is a question whether all "constitutional torts" are properly understood as torts. As the Supreme Court has

III.

We next address Meyer's claim that he was unconstitutionally deprived of his property interest without

noted,

> In some cases, the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right. . . . In other cases, the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law of torts.

Carey v. Piphus, 435 U.S. 247, 258 (1978). In the latter situation, it would seem incongruous to bar an action against a sue-and-be-sued agency by invoking the FTCA when the underlying action was not a tort action at all.

Whether or not such be the case here is debatable. In *Owen v. City of Independence*, 445 U.S. 622 (1980), the Court first suggested that a constitutional claim arising out of a discharge without due process of law could be analogized to a common law action for breach of contract, *see id.* at 639 & n.19, only to proceed to describe it as a tort action a few pages later. *See id.* at 642.

What we do know, however, is that the closest common law analogy to Meyer's claim is breach of an implied covenant of good faith and fair dealing, *see infra*, and that under California law, it is established that "tort remedies are *not* available for breach of the implied covenant in an employment contract to employees who allege they have been discharged in violation of the covenant." *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 700, 254 Cal. Rptr. 211, 239-40 (1980). Rather, "contractual remedies should remain the sole available relief." *Id.* at 696; *see also Mundy v. Household Finance Corp.*, 885 F.2d 542, 544 (9th Cir. 1989); *Aalgaard v. Merchants Nat. Bank, Inc.*, 224 Cal. App. 3d 674, 678 n.1, 274 Cal. Rptr. 81, 82 n.1 (1990). *Compare, e.g., Love v. United States*, 915 F.2d 1242, 1247 & n.3, 1248 (9th Cir. 1989) (finding that, under Montana law, the "implied covenant of good faith and fair dealing" is "recognize[d] as a separate cause of action in tort") (citing *Nicholson v. United Pacific Ins. Co.*, 219 Mont. 32, 710 P.2d 1342, 1348 (1985)). That Meyer's claim does not sound

due process of law. We review this question de novo. *United States v. McConney*, 728 F.2d 1195, 1203 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984).

In *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972), and *Perry v. Sindermann*, 408 U.S. 593, 601 (1972), the Supreme Court held that to have a property interest, an individual must possess an entitlement to the benefit. Entitlements are created not by the Constitution, but by "independent source[s] such as state law." 408 U.S. at 577. Relying on *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980), and *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981), the district court found that Meyer had stated a proper claim under state law for enjoyment of continued employment. *See also Foley*, 47 Cal.3d at 676-82, 254 Cal. Rptr. at 222-26.[18]

in tort under California law further discredits the invocation of the FTCA to bar his action.

[18] In *Cleary*, plaintiff had worked to the employer's satisfaction for 18 years. 111 Cal. App. 3d at 447, 168 Cal. Rptr. at 724. The court stated that termination "of employment without legal cause after such a period of time offends the implied in law covenant of good faith and fair dealing contained in all contracts, including employment contracts." 111 Cal. App. 3d at 455, 168 Cal Rptr. at 729. In *Pugh*, the court found that some employers' conduct could give "rise to an implied promise that it would not act arbitrarily" in its dealing with employees. 116 Cal. App. 3d at 329, 171 Cal. Rptr. at 927. In particular, the court looked at "the duration of [plaintiff's] employment, the commendations and promotions he received, the apparent lack of any direct criticism of his work, the assurances he was given, and the employer's acknowledged policies." *Id. See also Russell v. Mass. Mut. Life Ins. Co.*, 722 F.2d 482, 492 n.10 (9th Cir. 1983), *rev'd on other grounds*, 473 U.S. 134 (1985).

In *Foley*, the California Supreme Court disapproved of *Cleary's* holding "to the extent that [it] permit[s] a cause of

The terms and conditions of Meyer's employment that support his claim include his sixteen years of service for Fidelity, his frequent promotions and commendations and Fidelity's general policy of termination only upon a showing of good cause.

The FSLIC urges that, notwithstanding Fidelity's conduct, a contract for indefinite employment barring good cause was in excess of governing federal regulations. 12 C.F.R. § 563.39, in effect at the time of appellee's termination, provided that:

> An insured institution shall not enter into an employment contract with any of its officers or other employees if such contract would constitute an unsafe or unsound practice . . . [T]he making of such an employment contract would be an unsafe or unsound practice if such contract could lead to material financial loss or damage to the insured institution or could materially interfere with the exercise by the members of its board of directors of their duty of discretion provided by law, charter, bylaw or regulation as to the employment of an officer or employee of the institution. This may occur, depending upon the circumstances of the case, where an employment contract provides for an excessive term, or does not contain an appropriate termination for cause provision.

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action seeking tort remedies for breach of the implied covenant." 47 Cal.3d at 700 n.42, 254 Cal. Rptr. at 240 n.42; *see also supra* at note 18. However, the type of remedy available has no bearing on the issue whether Meyer enjoyed a reasonable expectation of continued employment. *Foley* itself makes this pellucidly clear by relying extensively on *Pugh* and, specifically, on the factors the court deemed critical in that case to find an implied promise. 47 Cal.3d at 676-82, 254 Cal. Rptr. at 222-26.

Cf. United States v. Gaubert, 111 S. Ct. 1267, 1277 (1991) (describing the FSLIC's "broad statutory authority"). The FSLIC's argument is that by virtue of 12 C.F.R. § 563.39, Meyer never enjoyed a property interest in continued employment. Because a guarantee of continued employment would be inconsistent with section 563.39, it follows that it must be considered non-enforceable.

As support for its position, the FSLIC invokes *Inglis v. Feinerman,* 701 F.2d 97 (9th Cir. 1983), *cert. denied,* 464 U.S. 1040 (1984), and *Bollow v. Federal Reserve Bank,* 650 F.2d 1093 (9th Cir. 1981), *cert. denied,* 455 U.S. 948 (1982). In both cases, plaintiffs asserted that their employment contracts gave rise to property interests that were unconstitutionally terminated. *Inglis,* 701 F.2d at 99; *Bollow,* 650 F.2d at 1096. The court disagreed. In *Inglis,* the employer was a federal bank created under the Federal Home Loan Bank Act, 12 U.S.C. § 1421 *et. seq.,* 701 F.2d at 98; in *Bollow,* it was a federal reserve bank governed by the Federal Reserve Act of 1913, 12 U.S.C. § 341, Fifth. 650 F.2d at 1097. The two relevant statutes gave the employer the power "to dismiss at pleasure" officers and employees. *Inglis,* 701 F.2d at 98; *Bollow,* 650 F.2d at 1097. Despite allegations that the bank's overall conduct and communications amounted to a promise of continued employment, the court held such purported pledges to be void and nonenforceable in light of inconsistent and controlling federal statutes. 701 F.2d at 98; 650 F.2d at 1099-100. *See also Aalgaard,* 224 Cal. App. 3d 674, 274 Cal. Rptr. 81 (construing in similar fashion the National Banking Act, 12 U.S.C. § 24, Fifth).

Although the analogy is seductive, it ultimately must fail. To begin with, there is no equivalent "dismissal at

pleasure" language in the instant case. It is one thing to have a federal statute that grants banks the power to terminate employment contracts at will, quite another to forbid insured associations from entering into burdensome or unsafe contracts. Where the former clearly collides with a "for cause" provision, the latter, at most, qualifies it. As Meyer remarks, it is perfectly plausible that a contract contemplating dismissal only for good cause would not "constitute an unsafe or unsound practice" under 12 C.F.R. § 563.39.

More importantly, the cases cited by the FSLIC all involve federal banks created under federal statutes. Here, although governed in part by federal law, the employer was a state-chartered savings institution. Federal law, which somehow "preempted" state law claims, *see Inglis*, 701 F.2d at 98 (explaining that *Bollow* "construed [12 U.S.C. § 341 (Fifth)] as preempting employee claims of wrongful discharge based on state law"); *Aalgaard*, 224 Cal. App. 3d 674, 274 Cal. Rptr. at 92 (finding that 12 U.S.C. § 24, Fifth preempted California law), does not preempt Meyer's action – nor indeed does the FSLIC claim that it does. In short, the contract allegedly created between Fidelity and Meyer cannot be voided on this ground.

The FSLIC directs its second set of arguments to the particularities of receivership law. First, it points to the broad power granted by Congress to federal receivers, citing their responsibility "to proceed to liquidate its assets in an orderly manner, whichever shall appear to be to the best interests of the insured members of the association in default." 12 U.S.C. § 1729(b) (repealed 1989). To compel the FSLIC to conduct a hearing before exercising

its authority would, it is argued, be inconsistent with congressional intent.

Second, the FSLIC contends that its actions also are expressly permitted under California law because it incorporates applicable federal law. Indeed, California Financial Code § 9103 (repealed 1983), provides that a state receiver, "shall have all the rights, privileges and powers conferred upon it by federal statutes now or hereafter enacted." *See Fidelity Savings & Loan Ass'n v. Federal Home Loan Bank Board*, 689 F.2d 803, 810 (9th Cir. 1982) (stating that under this provision, "California law thus incorporates all federal law concerning the powers of the FSLIC as receiver"), *cert. denied*, 461 U.S. 914 (1983).

Once again, the FSLIC's argument is appealing. Stated somewhat differently, the contention is that Meyer's purported entitlement to continued employment was, from its very inception, defined conditionally, limited by the prospect of Fidelity's placement in receivership. With the implicit promise came the implied caveat.

Ultimately, however, this reasoning also is flawed. The source of Meyer's property right was California common law, a history of satisfactory employment, and an understanding of fair dealing. The fact that federal and, arguably, state law conferred wide discretion to receivers to repudiate "burdensome" contracts does not, retrospectively, annul the state entitlement. In *FDIC v. Mallen*, 486 U.S. 230 (1988), for example, the president and director of a federally insured bank was indicted on a number of charges. *Id.* at 236. As a result, the FDIC suspended him pursuant to 12 U.S.C. § 1818(g)(1), which authorizes precisely such action. *Id.* at 237-8. Reading the case through

the FSLIC's eyes, one would be tempted to say that there had been no deprivation of a property interest, since the interest itself was contingent upon the plaintiff not being indicted – in other words, the president's entitlement to continued employment could not survive his indictment, for that would be inconsistent with the FDIC's right to dismiss under federal regulations.

The Court, however, saw it differently. Without hesitation, if found that the plaintiff's right to continue as president was "protected by the Fifth Amendment Due Process Clause," and that "the FDIC's order of suspension affected a deprivation of this property interest." *Id.* at 240.[19] That the suspension was foretold made it no less of a deprivation.[20]

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[19] In *Mallen*, of course the statute did in fact give the suspended officer the right to a post-suspension hearing. It should be noted, however, that the right was given only after an initial statute that permitted suspension without a hearing had been ruled unconstitutional. *Id.* at 234. The point, simply, is that the existence of a provision allowing for termination or suspension in the event some occurrence were to take place does not simultaneously redefine the property interest at stake. Indictment did not trigger an interruption of constitutional protection; neither should receivership.

[20] Likewise, in ruling that a state-created entitlement to education meant that students could not be suspended on grounds of misconduct without due process, the Court in *Goss v. Lopez*, 419 U.S. 565 (1975), was unmoved by the existence of a state law permitting such action. In particular, the Court rejected the dissent's reasoning, reminiscent of the FSLIC's in this case:

> The Ohio statute that creates the right to a "free" education also explicitly authorizes a principal to suspend a student for as much as 10 days. Thus the very legislation which "defines" the "dimension" of the student's entitlement, while providing a right to education generally, does not establish this right free of discipline imposed in accord with Ohio law.

419 U.S. at 586-87 (Powell, J., dissenting) (citation omitted).

Undoubtedly, federal receivership law reflects the urgency of the situation facing savings and loan institutions. The right given receivers to dispose expeditiously of burdensome contracts is an outgrowth of this emergency; but the weight of the federal interest goes to the question of *what*, not *whether*, process is due. The facts alleged in this case suggest that the FSLIC arbitrarily terminated some employees while retaining others. Meyer, for his part, was never given an opportunity to hear or be heard, and it was never determined – at least not openly – that keeping *him* aboard would somehow destabilize the entire crew. At a minimum, Meyer "must be given *some* kind of notice and afforded *some* kind of hearing" – "rudimentary precautions" guaranteed by the due process clause. *Goss*, 419 U.S. at 579, 581 (emphasis in original). Accordingly, we affirm the district court on this point.

IV.

Meyer also brought a *Bivens* action against Pattullo stemming from the alleged violation of plaintiff's Fifth Amendment rights. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). While the FTCA presents no bar to Meyer's *Bivens* action, he faces a different kind of obstacle in his suit against Pattullo. An official in Pattullo's position is entitled to

qualified immunity when his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Finkelstein v. Bergna*, 924 F.2d 1449, 1451 (9th Cir. 1991); *Thorsted v. Kelly*, 858 F.2d 571, 573 (9th Cir. 1988). Thus, "[t]he relevant inquiry is whether a reasonable government official could have believed that his conduct was lawful, in light of clearly established law and the information he possessed." *Thorsted*, 858 F.2d at 573 (citing *Anderson v. Creighton*, 483 U.S. 635 (1987)).

In this case, after having received instructions from the court that were challenged by the plaintiff, the jury returned a verdict in favor of Pattullo on the grounds of qualified immunity. The court's instructions were as follows:

> The law provides government officials, such as the defendant, Robert Pattullo, with a defense of alleged violation of federal constitution and statutory law which is known as qualified immunity. . . .
>
> The defendant, Robert Pattullo, is entitled to the defense and has asserted the defense of qualified immunity if he can establish by a preponderance of the evidence that a reasonable government official confronted with similar circumstances in this case could have been believed [sic] that his actions were lawful.
>
> In determining whether a defendant, such as Robert Pattullo, is entitled to the defense of qualified immunity, you must consider whether the defendant could have reasonably believed

> that his actions were lawful in light of the defendants' official duties, the character of his official position, the facts of which he was aware and the events which confronted him.
>
> The reasonableness of the defendant Pattullo's belief is determined by the reasonable person's standard. It is not what the defendant Pattullo subjectively believed, but whether his belief that his actions in terminating the plaintiff were reasonable when judged by professional standards.

We begin, uncharacteristically, with substantial agreement: neither party disputes that the jury was improperly instructed. In light of controlling precedent, a proper instruction should refer *both* to the factors enumerated in this case *and* to "clearly establish law." *See, e.g., Thorsted*, 858 F.2d at 573. The district court rejected plaintiff's and defendants' proposed instructions, both of which met this requirement; clearly, it was in error.[21] This, however, does not end the inquiry.

As we recently noted, the trial court has wide latitude in formulating instructions and will be reviewed for abuse of discretion only. *Benigni v. City of Hemet*, 897 F.2d 473, 479 (9th Cir. 1988); *Thorsted*, 858 F.2d at 573. The reviewing court must determine "whether, considering the charge as a whole, the court's instructions fairly and

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[21] Arguably, the district court's decision to submit the question of qualified immunity to the jury means that it "necessarily found that the legal rules were clearly established in this area." *Brady v. Gebble*, 859 F.2d 1543, 1556 (9th Cir. 1988). *cert. denied*, 489 U.S. 1100 (1989). The court's conviction is not the issue, however; rather, it is the propriety of its explanation of the law to the jurors.

adequately covered the issues presented, correctly stated the law, and were not misleading." *Thorsted*, 858 F.2d at 312. An error of instruction will not be reversed "if it is more probably than not harmless." *Benigni*, 879 F.2d at 479; *see also Kisor v. Johns-Mansville Corp.*, 783 F.2d 1337, 1340 (9th Cir. 1986) ("We must consider whether the instruction . . . [is] to the prejudice of the objecting party").

We conclude that the error in this case was nonprejudicial based on our finding that, as a matter of law, " 'the facts alleged . . . [do not] support a claim of violation of clearly established law.' " *Vaughan v. Ricketts*, 859 F.2d 736, 739 (9th Cir. 1988) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 528 n.9 (1985)), *cert. denied*, 490 U.S. 1012 (1989). Although we believe Meyer's claim has merit, *see supra* Part III, "a reasonable officer . . . could have believed his actions toward [Meyer] were constitutional even if they were not." *Wood v. Ostrander*, 879 F.2d 583, 591 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 341 (1990).[22]

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[22] It will not suffice to say, as plaintiff does, that *Roth* and *Perry* had clearly established the applicable law some 19 years ago. The heart of the problem, no doubt, lies in the "level of generality at which the relevant 'legal rule' is to be identified." *Anderson*, 483 U.S. at 639; *see also Schiegel v. Bebourt*, 841 F.2d 937, 944 (9th Cir. 1988). As the level narrows, so too diminishes the likelihood that the official will be vulnerable to suit. Predictably, Meyer chooses to define the legal rule in as broad a manner as possible, evoking the right not to "be deprived of a constitutionally protected property interest until and unless he is afforded a due process hearing." Conversely, and just as predictably, Pattullo focuses on the narrowest possible definition, describing "FSLIC's termination of employees of a failed financial institution pursuant to takeover or liquidation" and "federal receivership law."

Because we find that a federal employee could reasonably have believed in the lawfulness of the actions at issue, we need not decide between these conflicting definitions. Still, we are mindful of the Supreme Court's admonition that

> the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right.... But if a test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*.

Anderson, 483 U.S. at 639.

Rules governing federally insured institutions and federal receivership make for treacherous law. Indeed, the district court went so far as to reverse itself, initially finding that Meyer did not have a legitimate expectation of continued employment. In order to be clearly established,

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Anderson, *483*, U.S. at 640 (citation omitted); *see also F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1315 (9th Cir. 1989); *Brady*, 859 F.2d at 1556. In light of the complex nature of Meyer's entitlement, reflected in both the district court's and our own examination of the issue, we are unable to say that *Anderson*'s standard has been met. The issue of qualified immunity should not have been submitted to the jury because Pattullo violated no *clearly established*

law. See Schwartzman v. Valenzuela, 846 F.2d 1209, 1211 (9th Cir. 1988) (question of clearly established right is question of law). Thus, any error in the qualified immunity instruction was harmless.

V.

Finally, Meyer contends that the district court erred by excluding expert testimony regarding the state of the law. A court's decision to exclude evidence is reviewed for abuse of discretion. *Ignacio v. People of the Territory of Guam*, 413 F.2d 513, 520 (9th Cir. 1969), *cert. denied*, 397 U.S. 943 (1970).

On numerous past occasions, this court has "condemned the practice of attempting to introduce law as evidence." *United States v. Unruh*, 855 F.2d 1363, 1376 (9th Cir. 1987), *cert. denied*, 488 U.S. 974 (1988). Indeed, "[i]t is not for witnesses to instruct the jury as to applicable principles of law, but for the judge." *Marx & Co., Inc. v. Diners' Club, Inc.*, 550 F.2d 505, 509-10 (2d Cir.), *cert denied*, 434 U.S. 861 (1977). If judges are advised to reject expert testimony on legal matters, surely it cannot be reversible error when they do so.

Conclusion

There are, essentially, two threshold matters in this case: the first is the FSLIC's immunity, and the second, Pattullo's. For the foregoing reasons, the district court's disposition on both issues is hereby

AFFIRMED

APPENDIX B

REGULATIONS

12 C.F.R. 569a.6(c) [In Effect On April 13, 1982] provides:

(c) *Assets, claims and contracts*. The Receiver shall have power to:

(1) Sell for cash or on terms, exchange, or otherwise dispose of, in whole or in part, any or all of the assets and property of the institution, real, personal and mixed, tangible and intangible, of any nature, including any mortgage, deed of trust, chose in action, bond, note, contract, judgment, or decree, share or certificate of share of stock or debt, owing to such institution or the Receiver.

(2) Surrender, abandon, and release any choses in action, or other assets or property of any nature, whether the subject of pending litigation or not, and settle, compromise, modify, or release, for cash or other consideration, claims and demands in favor of the institution or the Receiver.

(3) Reject or repudiate any lease or contract which it considers burdensome . . .

* * *

12 C.F.R. § 569a.8(a) and (b) [In Effect April 13, 1982] provides:

(a) The Receiver shall promptly publish, in a newspaper printed in the English language and of general circulation in the city or county in which the principal office of such institution is located, a notice to all creditors of such institution to present their claims with proof thereof to such Receiver on forms prescribed by the

Receiver on or before a date specified in such notice. The date specified in such notice shall be at least 90 days after the date of the first publication of such notice (Sundays and holidays included). Such notice shall be similarly published on dates approximately 1 month and 2 months after the date of such first publication. The Receiver shall mail a similar notice to any creditor, shown to be such on the books of the institution, at the last address of such creditor as the same shall appear on such books.

(b) Any claim filed on or before the date fixed pursuant to paragraph (a) of this section and proved to the satisfaction of the Receiver shall be allowed by the Receiver. The Receiver may disallow in whole or in part or reject in whole or in part any creditor claim or claims of security, or priority not proved to its satisfaction, and notice of such disallowance or rejection together with the reason therefore shall be served by the Receiver upon the claimant by certified mail. The mailing of notice of such disallowance or rejection to the last known address of any claimant appearing on the books or the proof of claim shall be deemed sufficient for the purposes hereof.

* * *

No. 92-741

In the Supreme Court of the United States

OCTOBER TERM, 1992

FEDERAL DEPOSIT INSURANCE CORPORATION,
PETITIONER

v.

JOHN H. MEYER, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**REPLY BRIEF FOR THE
FEDERAL DEPOSIT INSURANCE CORPORATION**

WILLIAM C. BRYSON
*Acting Solicitor General
Department of Justice
Washington, D.C. 20530
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TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-741

FEDERAL DEPOSIT INSURANCE CORPORATION, PETITIONER

v.

JOHN H. MEYER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION

1. The court of appeals found that respondent was entitled to recover $130,000 because FSLIC terminated his employment without a hearing. Respondent does not dispute that this ruling is unprecedented: no court of appeals has ever before held that a federal agency may be sued under a *Bivens* cause of action. Respondent argues, however, that the court of appeals' legal determination that sue-and-be-sued agencies can be held liable for constitutional torts on a *Bivens* theory is correct, does not conflict with other decisions of the courts of appeals, and poses no threat to the ability of federal banking agencies to

perform their statutory functions or to the federal fisc generally.[1]

a. Respondent essentially follows the court of appeals' reasoning in defending its holding that the FTCA does not provide an exclusive remedy for constitutional torts because such torts are not "cognizable" under the FTCA. For the reasons given in the petition (Pet. 9-15), this holding is inconsistent with well-settled legal principles governing the interpretation and coverage of the FTCA.

Respondent further argues (Br. in Opp. 8) that the decision of the court of appeals does not conflict with the decision of the Eighth Circuit in *Peak* v. *SBA*, 660 F.2d 375 (8th Cir. 1981), because *Peak* did not involve a *Bivens* claim. That is true. But respondent does not even attempt to explain why that would make any difference under the Eighth Circuit's interpretation of the FTCA. A comparison of the two cases confirms that the Eighth Circuit would have dismissed respondent's claims under its holding in *Peak*.

In *Peak*, the plaintiff asserted a strict liability claim against a sue-and-be-sued agency. Like the

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[1] Respondent states that Fidelity "experienced severe financial difficulties but never became insolvent prior to when it was placed under federal receivership." Br. in Opp. 2. According to a joint stipulation entered into before trial, Fidelity had a net worth of $19,600,000 as of March 31, 1982, and was losing an average of $5,000,000 per month. C.A. Supp. Rec. Exc. 89. By March 1982, it had borrowed more than $1.3 billion from the Federal Home Loan Bank of San Francisco. *Ibid.* During the first week of April 1982, depositors withdrew nearly $70,000,000 in deposits. *Ibid.* Fidelity was placed into federal receivership on April 13, 1982. *Ibid.*

Bivens claim in this case, such a claim does not fall within any of the expressly denominated "exceptions" to the FTCA enumerated in 28 U.S.C. 2680(a), but was instead barred by the FTCA's basic jurisdictional provision, 28 U.S.C. 1346(b). According to the Ninth Circuit, the fact that the claim in this case is barred by Section 1346(b) means that it is only "implicitly" excluded from the FTCA and therefore is not "cognizable" under the statute. See 28 U.S.C. 2679(a). The identical argument was made by the plaintiff in *Peak*. 660 F.2d at 378. Unlike the Ninth Circuit in this case, however, the Eighth Circuit squarely *rejected* the plaintiff's argument, holding that the "practical effect * * * is the same as if Congress had included [the Section 1346(b) bar] as an exemption under section 2680." *Ibid.* Based on that holding, the Eighth Circuit concluded in *Peak* that the case could be brought only under the FTCA or not at all. There is nothing in the opinion of the Eighth Circuit, or its legal reasoning, to suggest that only some, but not all, tort claims barred by Section 1346 are cognizable under the FTCA. Accordingly, the Eighth Circuit's decision in *Peak* is in conflict with the Ninth Circuit's decision in this case.

Respondent also argues (Br. in Opp. 8) that there is no conflict between the court of appeals' decision in this case and the decisions of a number of other courts of appeals that have held that *Bivens* actions may not be brought directly against sue-and-be-sued agencies. Respondent asserts that *Ascot Dinner Theatre, Ltd.* v. *SBA*, 887 F.2d 1024 (10th Cir. 1989), is not in conflict because the court did not expressly decide whether the action in that case was

"cognizable" under the FTCA. As we explained in our petition, however, the analysis in *Ascot Dinner Theatre* demonstrates that the Tenth Circuit would not permit this action to be brought directly against FSLIC, a result in direct conflict with the result reached by the Ninth Circuit in this case. See Pet. 14-15.

Contemporary Mission, Inc. v. *United States Postal Service*, 648 F.2d 97, 105 n.9 (2d Cir. 1981), and *McCollum* v. *Bolger*, 794 F.2d 602, 608 (11th Cir. 1986), cert. denied, 479 U.S. 1034 (1987), involved the United States Postal Service, whose organic statute differs in some respects from that of FSLIC. Although respondent is correct (Br. in Opp. 8) that the Ninth Circuit in this case attempted to distinguish *Contemporary Mission* and *McCollum*, the court's distinction is unconvincing for the reasons set forth in the petition. See Pet. 15 n.10.

b. We explain in the petition (Pet. 16-18) that, even aside from the FTCA's exclusive remedy provision, respondent could not rely on the agency's sue-and-be-sued clause as a waiver of sovereign immunity for this claim. Respondent does not dispute our conclusion (Pet. 17-18) that suits of the type at issue in this case would be inconsistent with Congress's decision, in enacting the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), not to subject policy decisions by federal agencies to after-the-fact judicial review via the mechanism of a tort suit. See *United States* v. *Gaubert*, 111 S. Ct. 1267, 1277 (1991). Indeed, respondent neither cites nor discusses the discretionary function exception, which provides a clear indication that Congress did not intend to permit

direct actions against federal agencies for claims of this type.

c. We also explain in the petition (Pet. 18-20) that this Court in *Bivens* itself noted that direct impact on the federal fisc was the primary example of a "special factor[] counselling hesitation" before implying a *Bivens* cause of action. See *Bivens* v. *Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971). That fact, among others, strongly militates against implying a cause of action directly against the federal agency in this case.

Respondent's contentions to the contrary are unconvincing. Although it is true that "[a]gencies such as FDIC have budgets and experience operating successes and failures," Br. in Opp. 12, respondent seeks a judgment in this case that would run directly against the agency and that would thus have a direct impact on public funds. Indeed, in light of the recent, much-publicized use of public funds to supplement the savings and loan insurance fund, respondent's claim that a suit seeking a money judgment against the FDIC has no effect on the federal fisc is puzzling.[2]

Respondent's argument (Br. in Opp. 12) that a judgment against FDIC in this case would have no more fiscal impact than judgments against federal officials who are indemnified by the government also misses the point. Where such indemnity is author-

[2] Under 12 U.S.C. 1821a(a) (Supp. II 1990), the FSLIC Resolution Fund was funded by FSLIC's remaining assets and substantial public funds and borrowings, see 12 U.S.C. 1821a(b) (Supp. II 1990), to pay, *inter alia*, "[a]ny judgment resulting from a proceeding to which [FSLIC] was a party prior to its dissolution." 12 U.S.C. 1821a(d) (Supp. II 1990).

ized—and, as respondent concedes (*ibid.*), it is never absolute—it represents a decision by Congress or an agency acting within its delegated authority that such indemnity is an appropriate way to expend public funds. The fact that public funds are expended on other, authorized purposes—including indemnification of federal officials in some *Bivens* actions—provides no support for respondent's claim that spending such funds on judgments in cases like this would not have an untoward impact on the federal fisc.

In addition, respondent's claim that the fiscal impact of the *Bivens* remedy recognized in this case is no different from the impact of the *Bivens* remedy recognized against individual officials is belied by the judgment in this very case. The individual official was found to be immune from suit, but the agency was nevertheless held liable. The availability of qualified immunity for official acts has substantially limited the fiscal impact of the more limited *Bivens* remedy previously recognized. *Bivens* claims against agencies could dramatically increase that liability.

2. We demonstrate in the petition (Pet. 23-25) that respondent's employment rights as against a federal receiver are governed by federal—not state—law, and that federal law does not recognize any right to continued employment in the context of this case. It follows that respondent was deprived of no property interest when he was dismissed. Respondent does not appear to address that argument.

Respondent does argue (Br. in Opp. 13) that federal regulations that grant the receiver authority to "[r]eject or repudiate any lease or contract which it consider[ed] burdensome," 12 C.F.R. 569a.6(c)(3)

(1982), should be construed to provide for a hearing before any such contract or lease is repudiated. That contention demonstrates the severe impact of the court of appeals' decision in this case. Respondent's argument would apply to *any* party who could claim to have an express or, as in respondent's case, implied contract with a financial institution in receivership that was not fully performed at the time the receiver was appointed. Under respondent's argument, any such party would have a right to a hearing concerning whether its contract should be repudiated. To recognize that right would be inconsistent with settled principles giving receivers the near-absolute discretion to repudiate executory contracts. See, *e.g.*, Pet. 24 n.14 (citing cases). It would also add an entirely new layer of complexity, not contemplated by Congress, to the receiver's already difficult task of resolving receiverships quickly and efficiently, at the least cost to the federal fisc and to public confidence in the banking system.

Respondent also disputes (Br. in Opp. 14-15) our alternative claim that he was not denied any possible property interest in continued employment, because he retained the right, like any other creditor of his employer, to pursue a claim against his employer's estate. He argues that "[t]he claim procedure that might otherwise have given [him] some right to relief was never instituted" in connection with the Fidelity receivership (*ibid.*) because FSLIC never published "notice to all creditors * * * to present their claims with proof thereof * * * on forms prescribed by the Receiver on or before a date specified in such notice." 12 C.F.R. 569a.8(a) (1982).

Respondent is mistaken in contending that FSLIC's failure to publish notice of the claims procedure establishes that his summary termination violated the Due Process Clause. Respondent retained distinct remedies for the receiver's failure to publish the notice contemplated by the regulation. Respondent could have simply submitted his claim to the receiver for action. Moreover, respondent retained the right to bring suit on his claim for breach of his alleged implied contract for continued employment.[3] Thus, insofar as his alleged implied contractual right to continued employment survived the appointment of the federal receiver, it was transformed—like the claim of any other contractual partner of Fidelity—into a claim against Fidelity's estate.[4] Because he was not deprived of that claim, he

[3] Count VIII of Respondent's First Amended Complaint pleaded that the defendants in this case had "breached the implied covenant in plaintiff's employment contract * * * that plaintiff would not be terminated without just cause." C.A. Rec. Exc. 11. FSLIC's trial counsel argued in moving to dismiss the complaint that only the Claims Court would have jurisdiction over that breach of contract claim under 28 U.S.C. 1346(a)(2) and 1491(a)(1). We now believe that view to have been erroneous, in light of the sue-and-be-sued clause in FSLIC's charter. In any event, respondent neither filed suit in the Claims Court nor continued to litigate the issue of the district court's jurisdiction over his claim for breach of contract, even though the district court never ruled on that jurisdictional issue. Instead, respondent simply dropped the breach of contract claim when he filed his Second Amended Complaint. See C.A. Supp. Rec. Exc. 1-19.

[4] Although suit on such a claim ordinarily could not have been maintained unless respondent had previously submitted it to the receiver, this Court has held that failure to submit a

was not deprived of any property interest within the meaning of the Due Process Clause.

Respondent's arguments therefore reduce to the proposition that breach of a contract by a federal agency—even if authorized, as here, by valid regulations—violates the Due Process Clause unless the party whose contract is breached has been afforded the panoply of procedural due process protections. In our view, that conclusion is indeed a necessary consequence of the court of appeals' decision in this case and threatens a dramatic and inappropriate constitutionalization of federal contract law. For that reason, as well as for the reasons stated in our petition, further review is warranted.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

FEBRUARY 1993

claim to the receiver is excused if the claims process is inadequate. *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 579-587 (1989).

(8)

No. 92-741

In the Supreme Court of the United States

OCTOBER TERM, 1992

FEDERAL DEPOSIT INSURANCE CORPORATION,
PETITIONER

v.

JOHN H. MEYER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED: OCTOBER 27, 1992
CERTIORARI GRANTED: MARCH 22, 1993

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* The opinion of the court of appeals is printed in the appendix to the petition for a writ of certiorari and has not been reproduced here.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CV-83-2204-JPV

MEYER

v.

FIDELITY SAVINGS AND LOAN ASSOCIATION, ET AL.

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1983		
May 2	1	COMPLAINT: summons issued. Demand for Jury Trial.
Jul 5	5	Defendants Citicorp and Fidelity's ANSWER TO COMPLAINT; Demand for Jury Trial. (Citicorp Savings and Fidelity Savings)
Oct 3	11	Defendant Yang, ANSWER TO COMPLAINT.
	12	Plaintiff's notice of motion for leave to file amended complaint. Hearing set for 10-31-83 @ 10:30 a.m.
	13	—memo of points & authorities in support #12.
	14	—affidavit in support of #12
	15	—affidavit of service by mail.
Oct 17		REASSIGNED PURSUANT TO ORDER OF THE ASSIGNMENT COMMITTEE

DATE	NR.	PROCEEDINGS
1983		
Nov 21	16	Plaintiff's Notice of Motion for Leave to File Amended Complaint 12-7-83 at 10:00a.m.
Dec 5	17	Plaintiff's Memo of Points and Authorities in support of #16
7	18	ORDER: Plaintiff is given leave to file amended complaint, Defendant to answer within ten day of service JPV
	19	Plaintiff's 1ST AMENDED COMPLAINT, Demand for Jury Trial
1984		
Jan 30	21	Defendant Yang's ANSWER TO 1ST AMENDED COMPLAINT, Demand for Jury Trial
Feb 8	22	Defendants Fidelity and Citicorp's ANSWER TO 1ST AMENDED COMPLAINT Demand for Jury Trial
Mar 16	23	Defendant Federal & Pattullo's Notice and Motion to Dismiss Counts One Through Eight of 1st Amended Complaint 5-3-84 at 10:00a.m.
	24	Defendants Federal & Pattullo's Motion to Dismiss Counts One Through Eight
	25	Defendants Federal & Pattullo's Memo in support of #24
Apr 26	27	Defendant U.S.'s Notice of Joindure in Motion to Dismiss
May 3	28	Plaintiff's Opposition to Defendant FSLIC & Pattullo's Motion to Dismiss Counts 1-8
Jul 11	32	STIPULATION AND ORDER: Motion to Dismiss is Continued from 6-7-84 Until After Filing of Amended Complaint, Complaint to be Filed by 6-22-84
	33	Plaintiff's 2ND AMENDED COMPLAINT

DATE	NR.	PROCEEDINGS
1984		
Jul 16	34	Defendant U.S.'s ANSWER TO 2ND AMENDED COMPLAINT
27	36	Defendants Federal & Pattullo's Notice of Motion to Dismiss Counts I-III, V & VIII of 2nd Amended Complaint 9-20-84 at 10:00a.m.
	37	Defendants Federal & Pattullo's Motion to Dismiss
	38	Defendants Federal & Pattullo's Memo in Support of #37
31	39	Defendant U.S.'s Notice of Motion to Dismiss Count Three, 9-20-84 at 10:00a.m.
	40	Defendant U.S.'s Memo in Support of Motion to Dismiss
Aug 14	43	Defendant Yang's ANSWER TO 2ND AMENDED COMPLAINT—Demand for Jury Trial
Sep 6	44	Plaintiff's Opposition to Defendant FSLIC and Pattullo's Motion to Dismiss
	45	Plaintiff's Opposition to Defendant U.S.'s Motion to Dismiss
14	47	Defendants Fidelity and Citicorp's ANSWER TO 2ND AMENDED COMPLAINT—Demand for Jury Trial
20	48	Defendants' Reply Memo in Support of Motion to Dismiss Counts 1-111, V & VIII of 2nd Amended Complaint
Sep 24	49	Defendant U.S.'s Reply in Support of Motion to Dismiss Count 3
1985		
Jan 23	52	ORDER GRANTING MOTION TO DISMISS IN PART: Count I is Dismissed as plaintiff's

DATE	NR.	PROCEEDINGS
1985		
		claims respecting the breach of alleged contract for continued employment; Counts II & III are Dismissed; Count V is Dismissed as to plaintiff's claims concerning alleged breach of the covenant of good faith and fair dealing and his tort claims; In all other respects the complaint stands JPV
		—Entered in Civil Docket 1-24-85 Clerk
May 3	55	Plaintiff's Notice of Motion for Modification of Order of 1-23-85 6-27-85 to 10:00a.m.
	56	Plaintiff's Motion for Modification of Order
Jun 13	58	Defendants U.S.'s Memo in Opposition to Plaintiff's Modification of Order
	59	Defendant Yang's Response to Plaintiff's Motion for Modification of Order
	60	Defendant Fidelity's Opposition to Plaintiff's Motion for Modification of Order
17	61	Defendant Yang's Notice of Motion and Motion to Dismiss—Memo of Points and Authorities 7-18-85 at 10:00a.m.
Dec 26	80	STIPULATION AND ORDER OF DISMISSAL: Defendant Linda Tsao Yang is dismissed without prejudice each party to bear own costs JPV
1986		
Mar 21	86	Defendants' Fidelity et al's Notice of Motion and Motion for Summary Judgment, 4-18-86 at 10:00a.m.
	87	Defendants' Memo of Points and Authorities in Support of #86
	88	Defendants' Declaration of Robert J. Yorio in Support of #86

DATE	NR.	PROCEEDINGS
1986		
Apr 4	95	Plaintiff's Response to Motion for Summary Judgment by Citicorp & Fidelity
	96	Plaintiff's Declaration of Blair W. Lindsay in Opposition to Motion for Summary Judgment by Citicorp and Fidelity
11	97	Defendants Citicorp & Fidelity's Reply Memo Supporting Motion for Summary Judgment
	98	Defendants' Supplemental Declaration of Robert J. Yorio in Support of Motion for Summary Judgment
Jul 29	101	ORDER: re Sua Sponte Reconsideration of Jan. 23, 1985 Dismissal Order, parties are to submit supplemental memoranda concerning the propriety of the dismissal of Counts I and III in accordance with the following schedule: original moving parties memo due 9-4-86, plaintiff's opposition due 9-18-86, reply due 9-25-86, matter set for hearing on 10-9-86 at 10:00a.m. JPV
Aug 15	102	MEMORANDUM OF OPINION AND ORDER: Fidelity Federal and Citicorp's Motion for Summary Judgment is GRANTED, Fedelity Savings' Motion for Summary Judgment is DENIED (see Order) JPV Entered in Civil Docket 8-19-86 Copies to Counsel Clerk
Sep 4	103	Defendant U.S.'s Supplemental Brief Re Propriety of Dismissal of Counts I and III
	104	Defendants Federal Savings & Pattullo's Supplemental Memo in Support of Motion to Dismiss Counts I and III of Second Amended Complaint

DATE	NR.	PROCEEDINGS
1986		
18	106	Plaintiff's Supplemental Memo of Points and Authorities, Counts I and III
25	107	Defendant U.S.'s Supplemental Reply Brief
Sep 25	108	Defendants Federal Savings and Pattullo's Reply Memo in Support of Motion to Dismiss Counts I and III of the Second Amended Complaint
Oct 9	109	MINUTES: (C/R Sara Larkin) Sua Sponte reconsideration of prior order, prior order vacated in part, case continued to 12-11-86 for further status JPV
Nov 10	110	REPORTER'S TRANSCRIPT, 4-18-86
Dec 5	113	MEMORANDUM OF OPINION AND ORDER: Count I of the Second Amended Complaint is reinstated in its entirety against defendants FSLIC and Pattullo and Count III remains dismissed against Defendants U.S., FSLIC and Pattullo JPV Entered in Civil Docket 12-8-86 Clerk
1987		
Oct 20	132	Plaintiff's joint pretrial statement.
1989		
Feb 16	140	STIPULATION AND ORDER: Trial will be held before a U.S. Magistrate JPV
Jun 20	150	Defendants Federal Savings et al's Notice of Motion for Summary Judgment or for Partial Summary Adjudication of Issues 7-21-89 at 9:30a.m.
	151	Defendants Federal Savings et al's Memo of Points and Authorities in Support of #150
	152	Defendants Federal Savings et al's Declaration of Daniel Johnson in Support of #150

DATE	NR.	PROCEEDINGS
1989		
Jun 20	154	Defendant Fidelity Savings' Notice of Motion and Motion for Summary Judgment 7-21-89 at 9:30 a.m.
	155	Defendant Fidelity Savings' Memo of Points and Authorities in Support of #154
	156	Defendant Fidelity Savings' Declaration of Robert Yorio in Support of #154
Jul 11	157	Plaintiff's Memo of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment or for Summary Adjudication
	158	Plaintiff's Declaration of Catherine Douat-Murray in Opposition to Motion for Summary Judgment
	159	Plaintiff's Declaration of Adolph Meyer in Opposition to Motion for Summary Judgment
	160	Plaintiff's Declaration of John Meyer in Opposition to Motion for Summary Judgment
17	163	Plaintiff's Memo of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment
	165	Defendants Fidelity Savings and Loan's TRIAL BRIEF
18	169	Defendants Federal Savings and Pattullo's Reply to #157
	170	Defendants Federal Savings and Pattullo's Trial Brief
	171	Defendants Proposed Jury Instructions
	173	Plaintiff's Proposed Jury Instructions
	174	Plaintiff's Trial Brief
Jul 14	176	REPORTER'S TRANSCRIPT. 10-9-86

DATE	NR.	PROCEEDINGS
1989		
21	177	Defendant Fidelity's Reply Memo in Support of Motion for Summary Judgment
28	178	MAGISTRATE'S MINUTES: (C/R tape 745) —Defendant's Motion for Summary Judgment, DENIED FJW(Mag.)
Aug 21	179	PRETRIAL CONFERENCE ORDER (see Order) FJW(Mag.)
	181	Plaintiff's Proposed Jury Instructions
Sep 6	188	MEMO OF DECISION: Defendants Fidelity et al's Motions for Summary Judgment is GRANTED as to Issue Nos. 2 and r and DENIED and to the remaining issues FJW(Mag.) Entered in Civil Docket 9-7-89 clerk
11	190	Defendants Federal Savings et al's Supplemental Trial Brief
	191	MAGISTRATE'S MINUTES: (C/R Larry White) Trial Began, further Trial set for 9-12-89 at 9:30a.m. FJW(Mag.)
	192	Joint Stipulated Statement of Undisputed Facts
12	193	MAGISTRATE'S MINUTES: Further Trial (C/R Larry White) further trial set for 9-13-89 at 9:30a.m., Claim of Immunity asserted by FSLIC, DENIED FJW(Mag.)
13	194	MAGISTRATE'S MINUTES: (C/R Larry White) Further Trial, continued to 9-14-89 at 9:30a.m. for Further Trial FJW(Mag.)
14	195	MAGISTRATE'S MINUTES: (C/R Larry White) Further Trial, continued to 9-18-89 at 9:45a.m. for further trial FJW(Mag.)

DATE	NR.	PROCEEDINGS
18	196	Defendants Federal Savings and Pattullo's Memo of Points and Authorities in Support of Supplemental Proposed Jury Instructions
	197	Defendants Federal Savings and Pattullo's Supplemental Proposed Jury Instructions
	198	MAGISTRATE'S MINUTES: (C/R Larry White) further trial, further trial set for 9-19-89 at 9:30a.m. FJW(Mag.)
Sep 19	201	MAGISTRATE'S MINUTES: (C/R Larry White) Trial—Plaintiff's closing statements FJW(Mag.)
	202	TITLE SHEET—List of Witnesses and Exhibits
	203	SPECIAL VERDICT
	204	Proposed Instructions Refused or Otherwise Covered by Court in Instructions
Sep 20	205	Instructions Given by Court
	206	JUDGMENT ON JURY VERDICT: The jury be a special verdict having found that plaintiff is entitled to damages in the sum of $130,000.00 as a result of his discharge from employment by defendants, and having further found that defendant Pattullo is immune from liability under the doctrine of qualified immunity Judgment is entered in the sum of $130,000.00 in favor of Plaintiff and against defendant FSLIC only and Judgment is entered in favor of defendant Pattullo and against the plaintiff FJW(Mag) Entered in Civil Docket 9-21-89 Copies to Counsel Clerk

DATE	NR.	PROCEEDINGS
1989		
Sep 11	207	Plaintiff's Motion in Limine re Measure of Damages for Constitutional Claims Under Bivens
29	210	Defendant Federal Savings' Notice of Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial, 11-2-89 at 9:30a.m.
	211	Defendant FSLIC's Memo of Points and Authorities in Support of #210
Oct 24	214	Plaintiff's Opposition to Motion for Judgment Notwithstanding the Verdict
26	215	Plaintiff's Opposition to Motion for Judgment Notwithstanding the Verdict
27	216	Defendant FSLIC's Reply Memo in Support of #210
Nov 3	217	MAGISTRATE'S MINUTES: (C/R tape 767) Defendant's Motion for Judgment Notwithstanding the Verdict/New Trial, DENIED FJW(Mag)
Nov 17	221	ORDER: FSLIC's Motion for Judgment Notwithstanding the Verdict is DENIED, and FSLIC's Motion for New Trial is DENIED FJW(Mag.)
Dec 14	222	Defendant FSLIC's NOTICE OF APPEAL—no fee—Notice to USCA and Counsel

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 89-16695

MEYER

v.

FSLIC

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
4/20/90	Filed original and 15 copies John H. Meyer's first brief on cross-appeal, (Informal: n) of 16 pages and 1 excerpts of record; served on 4/19/90 [89-16695, 90-15025] (sm) [89-16695 90-15025]
6/22/90	Filed original and 15 copies FSLIC, second brief on cross-appeal (Informal: n) of 48 pages and 1 excerpts of record; served on 6/20/90 [90-15025, 89-16695] (sm) [89-16695 90-15025]
8/10/90	Filed original and 15 copies John H. Meyer in 90-15025, John H. Meyer in 89-16695 third brief on cross-appeal (Informal: no) of 33 pages and 5 copies excerpts of record; served on 8/10/90 [90-15025, 89-16695] (vt) [89-16695 90-15025]
9/17/90	Filed original and 15 copies FSLIC in 89-16695, FSLIC in 90-15025 reply brief, (Informal: n) of 21 pages; served on 9/14/90. [89-16695, 90-15025] (dl) [89-16695 90-15025]
2/14/91	CALENDARED: SAN FRAN April 5, 1991 9:00 am Courtroom 100 McAllister [89-16695, 90-15025] (aw) [89-16695 90-15025]

DATE	PROCEEDINGS
4/5/91	ARGUED AND SUBMITTED TO Thomas TANG, Jerome FARRIS, Dorothy W. NELSON [89-16695, 90-15025] (mt) [89-16695 90-15025]
9/13/91	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Thomas TANG; Jerome FARRIS; Dorothy W. NELSON, author.) FILED AND ENTERED JUDGMENT. [89-16695, 90-15025] (ck) [89-16695 90-15025]
9/30/91	Filed motion & clerk order (vt) granting FSLIC an ext of time to file petition for rehearing with suggestion for rehearing en banc to and including Oct. 28, 1991. (Motion recvd 9/23/91) [89-16695, 90-15025] (vt) [89-16695 90-15025]
10/23/91	Filed FSLIC in 90-15025 motion to extend time to file petition for rehearing until 11/4/91 [89-16695, 90-15025] served on 10/22/91 [2016480] PANEL (vt) [89-16695 90-15025]
11/5/91	Filed order (Thomas TANG, Jerome FARRIS, Dorothy W. NELSON,): The motion, filed October 23, 1991, for an ext of time to and including November 4, 1991 in which to file a petition for rehearing and suggestion for rehearing en banc is GRANTED. in 89-16695, 90-15025 [89-16695, 90-15025] (vt) [89-16695 90-15025]
11/6/91	[2023011] Filed original and 40 copies of FSLIC petition for rehearing with suggestion for rehearing en banc 15 p.pages, served on 11/4/91 PANEL & ALL ACTIVE JUDGES [90-15025, 89-16695] (vt) [89-16695 90-15025]
4/1/92	Filed order (Thomas TANG, Jerome FARRIS, Dorothy W. NELSON,): Within fourteen days of the date of this order, aplt/Cross-Aple shall file a response to the Petition for Rehearing and Suggestion for Rehearing En Banc, filed Novem-

DATE	PROCEEDINGS
	ber 6, 1991, by Aple/Cross-Aplt. IT IS SO ORDERED. [89-16695, 90-15025] (vt) [89-16695 90-15025]
5/15/92	Filed Plf-Aplt/Cross-Aple (Meyer) response to the petition for rehearing ans suggestion for rehearing en banc. served on 5/15/92 PANEL & ALL ACTIVE JUDGES [90-15025, 89-16695] (vt) [89-16695 90-15025]
6/29/92	Filed order (Thomas TANG, Jerome FARRIS, Dorothy W. NELSON,): The petition for rehearing is denied and the suggestion for rehearing en banc is rejected. [2016480-1] [89-16695] (vt) [89-16695]
7/30/92	MANDATE ISSUED COSTS TAXED IN THE AMOUNT OF $264.40 [89-16695, 90-15025] (vt) [89-16695 90-15025]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-15025

MEYER

v.

FSLIC

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1/9/90	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Sent appellant(s) civil appeals docketing statement. setting cross appeal briefing schedule as follows: Fee payment is due 1/23/90 in 90-15025,; CADS due 1/23/90 for Gennaro A. Filice in 90-15025; first cross-appeal brief is due 4/20/90 in 90-15025, in 89-16695; second cross-appeal brief is due 5/30/90 in 90-15025, in 89-16695; third cross-appeal brief is due 6/29/90 in 90-15025, in 89-16695; optional cross-appeal reply brief is due 7/13/90 in 90-15025, in 89-16695; [90-15025, 89-16695] (rv) [89-16695 90-15025]
4/20/90	Filed original and 15 copies John H. Meyer's first brief on cross-appeal, (Informal: n) of 16 pages and 1 excerpts of record; served on 4/19/90 [89-16695, 90-15025] (sm) [89-16695 90-15025]
6/22/90	Filed original and 15 copies FSLIC, second brief on cross-appeal (Informal: n) of 48 pages and 1 excerpts of record; served on 6/20/90 [90-15025, 89-16695] (sm) [89-16695 90-15025]

DATE	PROCEEDINGS
8/10/90	Filed original and 15 copies John H. Meyer in 90-15025, John H. Meyer in 89-16695 third brief on cross-appeal (Informal: no) of 33 pages and 5 copies excerpts of record; served on 8/10/90 [90-15025, 89-16695] (vt) [89-16695 90-15025]
9/17/90	Filed original and 15 copies FSLIC in 89-16695, FSLIC in 90-15025 reply brief, (Informal: n) of 21 pages; served on 9/14/90. [89-16695, 90-15025] (dl) [89-16695 90-15025]
2/14/91	CALENDARED: SAN FRAN April 5, 1991 9:00 am Courtroom 100 McAllister [89-16695, 90-15025] (aw) [89-16695 90-15025]
4/5/91	ARGUED AND SUBMITTED TO Thomas TANG, Jerome FARRIS, Dorothy W. NELSON [89-16695, 90-15025] (mt) [89-16695 90-15025]
9/13/91	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Thomas TANG; Jerome FARRIS; Dorothy W. NELSON, author.) FILED AND ENTERED JUDGMENT. [89-16695, 90-15025] (ck) [89-16695 90-15025]
9/30/91	Filed motion & clerk order (vt) granting FSLIC an ext of time to file petition for rehearing with suggestion for rehearing en banc to and including Oct. 28, 1991. (Motion recvd 9/23/91) [89-16695, 90-15025] (vt) [89-16695 90-15025]
10/23/91	Filed FSLIC in 90-15025 motion to extend time to file petition for rehearing until 11/4/91 [89-16695, 90-15025] served on 10/22/91 [2016480] PANEL (vt) [89-16695 90-15025]
11/5/91	Filed order (Thomas TANG, Jerome FARRIS, Dorothy W. NELSON,): The motion, filed October 23, 1991, for an ext of time to and including November 4, 1991 in which to file a petition for

DATE	PROCEEDINGS
	rehearing and suggestion for rehearing en banc is GRANTED. in 89-16695, 90-15025 [89-16695, 90-15025] (vt) [89-16695 90-15025]
11/6/91	[2023011] Filed original and 40 copies of FSLIC petition for rehearing with suggestion for rehearing en banc 15 p.pages, served on 11/4/91 PANEL & ALL ACTIVE JUDGES [90-15025, 89-16695] (vt) [89-16695 90-15025]
11/19/91	Filed Appellant John H. Meyer and FSLIC in 90-15025's joint motion to hold the case in abeyance until 30 days after FDIC's petition for rehearing en banc has been determined. PANEL [90-15025] served on 11/18/91 [2027491] resent 7/30/92 (vt) [90-15025]
4/1/92	Filed order (Thomas TANG, Jerome FARRIS, Dorothy W. NELSON,): Within fourteen days of the date of this order, aplt/Cross-Aple shall file a response to the Petition for Rehearing and Suggestion for Rehearing En Banc, filed November 6, 1991, by Aple/Cross-Aplt. IT IS SO ORDERED. [89-16695, 90-15025] (vt) [89-16695 90-15025]
5/15/92	Filed Plf-Aplt/Cross-Aple (Meyer) response to the petition for rehearing ans suggestion for rehearing en banc. served on 5/15/92 PANEL & ALL ACTIVE JUDGES [90-15025, 89-16695] (vt) [89-16695 90-15025]
7/30/92	MANDATE ISSUED COSTS TAXED IN THE AMOUNT OF $264.40 [89-16695, 90-15025] (vt) [89-16695 90-15025]

UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT
STATE OF CALIFORNIA

Case No. C 83 2204 JPV
(Civil)

JOHN H. MEYER, PLAINTIFF

vs.

FIDELITY SAVINGS AND LOAN ASSOCIATION; FIDELTY FEDERAL SAVINGS AND LOAN ASSOCIATION OF SAN FRANCISCO; CITICORP SAVINGS AND LOAN; CITICORP BANK; LINDA TSAO YANG, CALIFORNIA SAVINGS AND LOAN COMMISSIONER; MR. DURKIN, CHIEF DEPUTY SAVINGS AND LOAN COMMISSIONER; FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a corporate instrumentality of the United States of America, as receiver for FIDELITY SAVINGS AND LOAN ASSOCIATION; FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a corporate instrumentality of the United States of America; THE UNITED STATES OF AMERICA; ROBERT L. PATTULLO; JOHN DOE and RICHARD ROE; inclusive, DEFENDANTS

SECOND AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

JURISDICTION AND VENUE

1. Plaintiff files this Second Amended Complaint and invokes the jurisdiction of this Court under 28 USC § 1343 to obtain costs of suit, reasonable attorneys fees

and damages suffered him and caused by defendants' violation of his rights as guaranteed in the First and Fourteenth Amendments to the Constitution of the United States and by Federal law, particularly the Civil Rights Act, 42 USC § 1983 and § 1985.

2. The violation of plaintiff's civil rights as alleged herein occurred in the State of California.

3. Jurisdiction is also sought under 28 USC § 1332. Plaintiff is a citizen of the State of Virginia. Defendants, FIDELITY SAVINGS AND LOAN ASSOCIATION; FIDELITY FEDERAL SAVINGS AND LOAN ASSOCITION OF SAN FRANCISCO; and CITICORP SAVINGS AND LOAN are corporations, incorporated under the laws of California, having their principal places of business in the State of California. LINDA TSAO YANG; MR. DURKIN; JOHN DOE and RICHARD ROE, are all citizens of the State of California and employed by the State of California. ROBERT L. PATTULLO is a citizen of the District of Columbia and employed by the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION. Defendant CITICORP BANK is a corporation incorporated under the laws of New York and having its principal place of business in New York. The matter in controversy, exclusive of interest and costs, exceeds the sum of ten thousand dollars ($10,000.00).

4. Jurisdiction is sought against defendants ROBERT L. PATTULLO; THE UNITED STATES OF AMERICA; FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER FOR FIDELITY SAVINGS AND LOAN ASSOCIATION (hereinafter sometimes referred to as "FSLIC AS RECEIVER"), and FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION (hereinafter sometimes referred to as "FSLIC"), under 28 USC § 1331. A federal question exists wherein plaintiff seeks to recover costs of suit, reasonable attorneys' fees and damages suffered by him and caused by such defendants' violation of his rights as

guaranteed in the First and Fourteenth Amendments to the Constitution of the United States and by Federal law, particularly the Civil Rights Act, 42 USC § 1983 and § 1985.

5. Jurisdiction is also sought against defendants, ROBERT L. PATTULLO; FSLIC and FSLIC AS RECEIVER, under 12 USC § 1730(k).

6. Plaintiff seeks jurisdiction against defendants, ROBERT L. PATTULLO; THE UNITED STATES OF AMERICA; FSLIC and FSLIC AS RECEIVER, under 28 USC § 1346(b), having complied with 28 USC § 2671 *et seq.*

7. Jurisdiction is also sought against defendants, ROBERT L. PATTULLO; THE UNITED STATES OF AMERICA; FSLIC and FSLIC AS RECEIVER, under 28 USC § 1491 and 28 USC § 1391.

8. Jurisdiction is also sought against defendants, ROBERT L. PATTULLO; THE UNITED STATES OF AMERICA; FSLIC and FSLIC AS RECEIVER, under 5 USC § 702 and 5 USC § 703.

9. Jurisdiction is also sought against defendants, FIDELITY SAVINGS AND LOAN ASSOCIATION, FIDELITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF SAN FRANCISCO; CITICORP SAVINGS AND LOAN; CITICORP BANK; LINDA TSAO YANG, CALIFORNIA SAVINGS AND LOAN COMMISSIONER; MR. DURKIN, CHIEF DEPUTY SAVINGS AND LOAN COMMISSIONER; FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a corporate instrumentality of the United States of America, as receiver for FIDELITY SAVINGS AND LOAN ASSOCIATION; FEDERAL SAVINGS AND LOAN INSURANCE CORPORTION, a corporate instrumentality of the United States of America; THE UNITED STATES OF AMERICA; ROBERT L. PATTULLO; JOHN DOE and RICHARD ROE, inclusive under 28 USC § 2201.

PARTIES

10. Plaintiff JOHN H. MEYER is a citizen of the State of Virginia and resides at Route 2, Box 209, City of Charlottesville, County of Albemarle, State of Virginia.

11. Defendants FIDELITY SAVINGS AND LOAN ASSOCIATION; FIDELITY FEDERAL SAVINGS AND LOAN OF SAN FRANCISCO; and CITICORP SAVINGS AND LOAN are corporation organized and existing under the laws of the State of California with principal places of business within that state.

12. Defendants LINDA TSAO YANG; MR. DURKIN; JOHN DOE and RICHARD ROE are citizens of the State of California and at all times herein mentioned were employed by the State of California.

13. Defendant ROBERT L. PATTULLO is at all times mentioned herein employed by the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION acting as special representative for the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION AS RECEIVER FOR FIDELITY SAVINGS AND LOAN ASSOCIATION.

14. Defendant CITICORP BANK is a corporation at all times mentioned herein incorporated under the laws of the State of New York and having its principal place of business in New York.

15. Defendants FSLIC AS RECEIVER and FSLIC at all times mentioned herein were corporate instrumentalities of the defendant UNITED STATES OF AMERICA.

16. At all times herein mentioned, each defendant was the agent, servant and employee of the other defendants, and in doing the things hereinafter mentioned was acting in the scope of its respective authority as such agent, servant and employee and with the permission and consent of the other defendants.

FACTS GIVING RISE TO CLAIM

17. Plaintiff was employed by FIDELITY SAVINGS AND LOAN ASSOCIATION and/or successor entities to said association for over sixteen years, from 1966 to April 14, 1982. During such sixteen years of employment, plaintiff performed his duties in a proper and forthright manner, earning over three promotions until his final position from 1980 until 1982 as Executive Vice President of Branch Operations. During plaintiff's sixteen years of employment by FIDELITY SAVINGS AND LOAN ASSOCIATION and/or successor entities to said association, plaintiff received numerous commendations, wage increases, bonuses, and so forth, for his loyal and excellent service. Further, during such employment, plaintiff's superiors with FIDELITY SAVINGS AND LOAN ASSOCIATION and/or successor entities to said association made representations to plaintiff that his employment with FIDELITY SAVINGS AND LOAN ASSOCIATION and/or successor entities to said association was permanent and secure in light of his loyal and excellent service and that he would not be terminated from his employment with FIDELITY SAVINGS AND LOAN ASSOCIATION absent good cause.

18. During plaintiff's sixteen years of service with FIDELITY SAVINGS AND LOAN ASSOCIATION and/or successor entities to said association, plaintiff was employed pursuant to the guidelines set forth in the Fidelity Savings And Loan Personnel Policies and Procedures Manual. Such Fidelity Savings and Loan Personnel Policies and Procedures Manual, sets forth the specific reasons for and the procedure to terminate an employee of Fidelity Savings and Loan. Further, such Fidelity Savings and Loan Personnel Policies and Procedures Manual establishes that an employee of Fidelity Savings and Loan becomes a permanent employee of Fidelity Savings and Loan Association upon completion of a three month probationary period.

19. As will be more fully explained below, on or about June 1, 1981, FIDELITY SAVINGS AND LOAN ASSOCIATION granted plaintiff additional compensation under a Stock Appreciation Plan in exchange for plaintiff's loyal and excellent service during his past, present and future employment with FIDELITY SAVINGS AND LOAN ASSOCIATION and/or successor entities to said association. On or about February 24, 1982, FIDELITY SAVINGS AND LOAN ASSOCIATION and plaintiff entered into a written Employment Severance Pay contract. Both the Stock Appreciation Plan and the Severance Pay contract were designed by FIDELITY SAVINGS AND LOAN ASSOCIATION to compensate key permanent employees in exchange for such employees' past and future services with FIDELITY.

20. Throughout plaintiff's sixteen years of service with FIDELITY SAVINGS AND LOAN ASSOCIATION and/or successor entities to said association, FIDELITY SAVINGS AND LOAN ASSOCIATION had a specific policy on discharging officers and directors of FIDELITY SAVINGS AND LOAN ASSOCIATION. Such discharge policy was communicated to plaintiff by his superiors and enforced by plaintiff in conjunction with his job duties and responsibilities. During plaintiff's sixteen years of employment by FIDELITY SAVINGS AND LOAN ASSOCIATION and/or successor entities to said association, the discharge policy for officers and directors was that no officer or director would be discharged by FIDELITY SAVINGS AND LOAN ASSOCIATION and/or successor entities to said association without good cause.

21. The previously discussed representations, policies, and conduct of FIDELITY SAVINGS AND LOAN ASSOCIATION and/or successor entities to said association, gave plaintiff a legitimate expectation of continued and permanent employment with FIDELITY SAVINGS AND LOAN ASSOCIATION and/or successor entities to said association.

22. Further, the previously discussed representations, policies and conduct of FIDELITY SAVINGS AND LOAN ASSOCIATION and/or its successor entities to said association, created an employment agreement between plaintiff and FIDELITY, and its successors. The terms of such employment agreement granted plaintiff the right to be employed by FIDELITY SAVINGS AND LOAN ASSOCIATION and/or successor entities to said association permanently, absent good cause for discharge, and prevented FIDELITY SAVINGS AND LOAN ASSOCIATION and/or successor entities to said association from breaching such agreement by terminating plaintiff without good cause.

23. Defendants, and each of them, at all times herein mentioned, had notice of and knowledge about plaintiff's legitimate expectation of continued and permanent employment by FIDELITY SAVINGS AND LOAN ASSOCIATION and/or successor entities to said association.

24. Defendants, and each of them, at all times herein mentioned, had notice of and knowledge about the employment contract and the terms and limitations within such employment contract between plaintiff and FIDELITY SAVINGS AND LOAN ASSOCIATION and/or successor entities to said association.

25. On or about February 24, 1982, at San Francisco, California, plaintiff and FIDELITY SAVINGS AND LOAN ASSOCIATION entered into a written employment severance contract, a copy of which is attached as Exhibit "A" and made a part hereof.

26. On or about June 1, 1981, FIDELITY SAVINGS AND LOAN ASSOCIATION, established a corporate policy that a Stock Appreciation plan would be provided as additional compensation to key employees in exchange for such employees' past and future services with FIDELITY SAVINGS AND LOAN ASSOCIATION. A copy of the Stock Appreciation Plan is attached as Exhibit "B" and made a part hereof, along with a

certificate showing that plaintiff received seven thousand (7,000) units of non-transferable stock rights.

27. At some time prior to October 1, 1981, FIDELITY SAVINGS AND LOAN ASSOCIATION adopted as corporate policy a Severance Plan as a term and condition of agreement with its officer-employees, a copy of which is attached hereto and marked as Exhibit "C". Plaintiff is informed and believes, and pursuant to that information and belief alleges that, pursuant to said Severance Plan that FIDELITY SAVINGS AND LOAN ASSOCIATION was to pay officer-employees six months severance pay on termination. Pursuant to this Severance Plan, plaintiff is entitled to the sum of twenty-three thousand five hundred dollars ($23,500.00).

28. On or about April 13, 1982 defendants LINDA TSAO YANG, Savings and Loan Commissioner of the State of California, and her agents, MR. DURKIN, JOHN DOE and RICHARD ROE, obtained and served upon FIDELITY SAVINGS AND LOAN ASSOCIATION certain documents which liquidated that Association and giving to the State of California possession of all property, business and assets of FIDELITY SAVINGS AND LOAN ASSOCIATION.

29. Thereafter, on or about April 13, 1982, LINDA TSAO YANG, as Savings and Loan Commissioner of the State of California, appointed the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION as State Receiver for FIDELITY SAVINGS AND LOAN ASSOCIATION pursuant to California Financial Code § 9009 and § 9102.

30. FSLIC AS RECEIVER created FIDELITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF SAN FRANCISCO which assumed the assets and obligations of FIDELITY SAVINGS AND LOAN ASSOCIATION. In conjunction with the creation of FIDELITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF SAN FRANCISCO by FSLIC AS RECEIVER, FSLIC AS RECEIVER assigned to FSLIC certain liabilities for

unpaid wages and benefits to employees terminated in conjunction with the regulatory takeover of FIDELITY SAVINGS AND LOAN ASSOCIATION by defendants, and each of them.

31. On or about September 28, 1982, the assets and liabilities of FIDELITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF SAN FRANCISCO were transferred by FSLIC and FSLIC AS RECEIVER to CITICORP BANK. CITICORP BANK transferred the assets and liabilities of FIDELITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF SAN FRANCISCO to a wholly owned subsidiary of CITICORP BANK entitled CITICORP SAVINGS AND LOAN.

32. There exists in the State of California a right of employees to not be terminated from a long-term and permanent employment relationship absent good cause. A violation of this right constitutes a breach of the employment contract as well as a tort.

33. There exists a right in the State of California to not be terminated from employment for reasons that violate public policy. A breach of this right constitutes the tort of wrongful termination.

34. On or about April 13, 1982, the defendants LINDA TSAO YANG; MR. DURKIN; ROBERT L. PATTULLO; JOHN DOE; RICHARD ROE and FIDELITY SAVINGS AND LOAN ASSOCIATION; the FSLIC and FSLIC AS RECEIVER conspired to terminate plaintiff in violation of public policy and without just cause, and on information and belief, pursuant to said conspiracy, plaintiff was terminated because he was the brother of the President of FIDELITY SAVINGS AND LOAN ASSOCIATION, rather than for just cause.

35. On or about April 13, or April 14, 1982, plaintiff was terminated from his employment by defendants FIDELITY SAVINGS AND LOAN ASSOCIATION; FIDELITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF SAN FRANCISCO; LINDA TSAO YANG; MR. DURKIN; FSLIC; FSLIC AS RECEIVER;

ROBERT L. PATTULLO; JOHN DOE and RICHARD ROE without just cause and on information and belief, was terminated because he was the brother to the President of FIDELITY SAVINGS AND LOAN ASSOCIATION, and in violation of his Constitutional statutory, and legal rights.

36. Prior to said termination, plaintiff received no due process, no notice of said termination, no right to be heard, and no opportunity to respond to any charges of impropriety or that he was doing a less than acceptable job at his employment.

37. Plaintiff performed all conditions, covenants and promises required on his part to be performed in accordance with the terms and conditions of his employment contract, Stock Appreciation Plan, Severance Plan and Employment Severance Contract, throughout his sixteen years of employment by FIDELITY SAVINGS AND LOAN ASSOCIATION and/or successor entities to said association.

38. In reliance on the terms and conditions of the Employment Severance Contract, Severance Plan, Stock Appreciation Plan, and implied employment contract, plaintiff was induced to maintain his employment at FIDELITY SAVINGS AND LOAN ASSOCIATION and/or successor entities to said association, through April 13, or April 14, 1982, as aforesaid.

39. Defendants, and each of them, knew or should have known that plaintiff would so rely and be so induced.

40. Defendants FIDELITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF SAN FRANCISCO; CITICORP SAVINGS AND LOAN; CITICORP BANK; FSLIC; and FSLIC AS RECEIVER are successors in interest to the assets and liabilities of FIDELITY SAVINGS AND LOAN ASSOCIATION.

41. When terminated from his employment, plaintiff was entitled to certain payments from FIDELITY SAVINGS AND LOAN ASSOCIATION including unpaid vacation benefits, Employment Severance contract benefits, the value of certain stock option rights under the Stock Appreciation Plan, monies under the Severance Plan, and other benefits totalling approximately one hundred four thousand five hundred dollars ($104,500.00), all of which he has not received, to his damage in the sum of one hundred four thousand five hundred dollars ($104,500.00).

42. A penalty, pursuant to § 203 of the California Labor Code is payable to plaintiff by reason of the willful failure of defendants, and each of them, to pay to plaintiff all wages due on the date of his termination of employment.

43. Plaintiff made demand of FSLIC to pay wages, employee benefits and penalties pursuant to § 203 of the California Labor Code. FSLIC and other named defendants in this action have refused or failed to pay to plaintiff such wages, employee benefits and penalties owed plaintiff and described hereinabove.

44. Since being terminated, plaintiff has been unable to procure like employment to that which he had prior to being wrongfully terminated and he believes that no such employment will be found in the future to his damage in the sum of seven hundred fifty thousand dollars ($750,000.00).

45. In addition, plaintiff has suffered severe emotional distress as a result of the premises to his damage in the sum of two hundred fifty thousand dollars ($250,000.00).

46. A claim under the California Tort Claims Act was filed on or about July 22, 1982, and was denied by the State Board of Control on October 5, 1982, with notice of said denial being sent on November 2, 1982.

47. A claim under the Federal Torts Claims Act was filed on or about February 28, 1983, and was denied by the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION on August 23, 1983.

48. The plaintiff has, at all times, performed his employment in a proper and appropriate manner, undertaking all duties required of him and has complied with all obligations of his employment contract with FIDELITY SAVINGS AND LOAN ASSOCIATION and/or its successors.

49. If plaintiff had been given a fair and impartial hearing conducted in accordance with basic elemental due process, he would have demonstrated with good and substantial evidence, why he should not have been terminated from his employment.

50. As a result of the wrongful acts of the defendants, and each of them, plaintiff has been deprived of his employment and has suffered a loss of income, reputation, and opportunity to pursue his chosen career.

CLAIMS FOR RELIEF

Plaintiff incorporates in each of these counts the allegations of paragraphs 1 through 50 above.

COUNT I

51. The actions of defendants LINDA TSAO YANG, MR. DURKIN; ROBERT L. PATTULLO; FSLIC; FSLIC AS RECEIVER; FIDELITY SAVINGS AND LOAN ASSOCIATION; FIDELITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF SAN FRANCISCO; JOHN DOE and RICHARD ROE violated the Fifth and Fourteenth Amendments to the United States Constitution in that by acting in concert, and individually as more fully set forth above, they had deprived plaintiff, MR. JOHN H. MEYER, of property without due process, more specifically, the decision to breach the employment contract and wrongfully terminate plaintiff without due process:

(a) Was arbitrary and capricious in that it was based on unlawful and irrelevant criteria;

(b) Was made without affording him notice and a hearing conducted in accordance with generally accepted principles of elemental fairness and due process;

(c) Was based upon unlawful criteria which differed from that uniformly applied to management personnel in the employ of FIDELITY SAVINGS AND LOAN ASSOCIATION.

52. As a result of the acts of the defendants, and each of them, the plaintiff has been damaged as hereinabove described.

WHEREFORE, plaintiffs pray for judgment as hereinafter set forth.

COUNT II

53. The actions of defendants LINDA TSAO YANG; MR. DURKIN; ROBERT L. PATTULLO; JOHN DOE and RICHARD ROE violated the Fifth and Fourteenth Amendments to the United States Constitution in that by acting in concert and individually, as more fully set forth above, they have deprived plaintiff, MR. JOHN H. MEYER, of property without due process, and said acts were done under color of state law, thereby violating the laws of the United States of America and specifically the Civil Rights Act, Title 42 USC § 1983.

54. As a result of the conduct of the defendants, and each of them, plaintiff has been damaged as hereinabove described.

WHEREFORE, plaintiff prays judgment as hereinafter set forth.

COUNT III

55. The defendants LINDA TSAO YANG; MR. DURKIN; ROBERT L. PATTULLO; FSLIC; FSLIC AS RECEIVER; FIDELITY SAVINGS AND LOAN ASSOCIATION; FIDELITY FEDERAL SAVINGS AND LOAN ASSOCATION OF SAN FRANCISCO; CITICORP SAVINGS AND LOAN; CITICORP BANK; UNITED STATES OF AMERICA; JOHN DOE and

RICHARD ROE, individually and in conspiring with each other, breached the employment contract between the plaintiff and FIDELITY SAVINGS AND LOAN ASSOCIATION, and its successors by terminating him without just cause, and in so doing, individually and in conspiring, committed the tort of breach of the implied covenant of good faith and fair dealing.

56. As a result of the conduct of the defendants, and each of them, plaintiff has been damaged as hereinabove described.

WHEREFORE, plaintiff prays judgment as hereinafter set forth.

COUNT IV

57. The defendants LINDA TSAO YANG; MR. DURKIN; FIDELITY SAVINGS AND LOAN ASSOCIATION; FIDELITY FEDERAL SAVINGS AND LOAN OF SAN FRANCISCO; CITICORP SAVINGS AND LOAN; CITICORP BANK; JOHN DOE and RICHARD ROE individually and acting in concert, as more fully set forth above, have interfered with the business relations of the plaintiff.

58. As a result of the conduct of the defendants, and each of them, plaintiff has been damaged as hereinabove described.

WHEREFORE, plaintiff prays judgment as hereinafter set forth.

COUNT V

59. The defendants FIDELITY SAVINGS AND LOAN ASSOCIATION; FSLIC; FSLIC AS RECEIVER; ROBERT L. PATTULLO; FIDELITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF SAN FRANCISCO; CITICORP SAVINGS AND LOAN; CITICORP BANK; JOHN DOE and RICHARD ROE breached the Severance Agreement, Severance Plan and the Stock Appreciation Plan with the plaintiff by failing to pay benefits owed to plaintiff upon termination of his

employment, which benefits are valued at approximately one hundred four thousand five hundred dollars ($104,500.00), and in so doing, also breached the implied covenant of good faith and fair dealing found within such specific contractual and employment agreements and incurred penalties under the California Labor Code for willful failure to pay such wages and benefits.

60. As a result of the conduct of the defendants, and each of them, plaintiff has been damaged as hereinafter described.

WHEREFORE, plaintiff prays judgment as hereinafter set forth.

COUNT VI

61. The defendants LINDA TSAO YANG; MR. DURKIN; FIDELITY SAVINGS AND LOAN ASSOCIATION; FIDELITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF SAN FRANCISCO; CITICORP SAVINGS AND LOAN; CITICORP BANK; JOHN DOE and RICHARD ROE conspired with each other to tortiously induce a breach of the plaintiff's employment contract.

62. As a result of the conduct of the defendants, plaintiff has been damaged as hereinabove described.

WHEREFORE, plaintiff prays judgment as hereinafter set forth.

COUNT VII

63. The defendants FIDELITY SAVINGS AND LOAN ASSOCIATION; JOHN DOE and RICHARD ROE breached the implied covenant in plaintiff's employment contract with FIDELITY SAVINGS AND LOAN ASSOCIATION, and its successors, that plaintiff would not be terminated without just cause.

64. As a result of the conduct of the defendants, plaintiff has been damages as hereinabove described.

WHEREFORE, plaintiff prays judgment as hereinafter set forth.

COUNT VIII

65. Plaintiff is in doubt as to which defendants are liable to plaintiff for amounts due under the Stock Appreciation Plan, Severance Plan and Employment Severance Contract and which defendants possess the assets originally held by FIDELITY SAVINGS AND LOAN ASSOCIATION to satisfy the above stated liability.

66. It is necessary that this Court render a declaratory judgment adjudging the legal relations of plaintiff as to each of the named defendants, including, but not limited to, the rights and obligations of FSLIC AS RECEIVER respecting plaintiff pursuant to 17 USC § 1730 and related provisions, and the obligations of each of the named defendants to pay plaintiff's Stock Appreciation Plan, Severance Plan, Employment Severance Contract and penalties as aforesaid.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff prays for judgment as follows:

a. Compensatory damages to plaintiff in the total sum of one million one hundred four thousand dollars ($1,104,000.00);

b. Damages pursuant to the penalty provisions of the California Labor Code;

c. For declaratory judgment adjudging the legal relations of plaintiff as to each of the named defendants arising out of the Stock Appreciation Plan, Severance Plan, Employment Severance Plan and penalties described hereinabove;

d. Costs of suit incurred herein including reasonable attorneys' fees; and

e. Such other and further relief as seems just and proper to this Court.

DATED:

Hardin, Cook, Loper, Engel & Bergez

By: ______________________

Gennaro A. Filice, III
Attorneys for Plaintiff
John H. Meyer

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury in this case.

DATED:

Hardin, Cook, Loper, Engel & Bergez

By: ______________________

Gennaro A. Filice, III
Attorneys for Plaintiff
John H. Meyer

Exhibit A

EMPLOYMENT SEVERANCE CONTRACT

Pursuant to a resolution of the Board of Directors of Fidelity Savings and Loan Association (hereinafter "Association"), this Agreement has been entered into by the Association and JOHN H. MEYER (hereinafter "Employee").

WHEREAS, the Association acknowledges the past and present services of Employee to the Association; and

WHEREAS, the Association acknowledges further the possibility that the Association may be forced to merge, sell or otherwise cease operation as an independent entity; and

WHEREAS, Employee has agreed to continue employment with the Association until such an eventuality may occur;

NOW, THEREFORE, IT IS AGREED between Association and Employee that in consideration of Employee's continued employment, Association agrees to pay Employee the equivalent sum of one (1) year's compensation as severance pay in the event that the Association is subjected to a regulatory merger or take over

IT IS FURTHER AGREED that this Employment Severance Contract shall become null and void in the event that:

1. Employee is offered a comparable position and compensation by a successor company or receiver, to that position and compensation which Employee presently holds with Association. In determining whether the position and compensation offered the Employee are comparable, primary emphasis shall be placed on compensation. A position shall be considered comparable if it requires the same general skills, experience and expertise as required by Employee's present position; provided that, an offered position shall not be deemed not to be com-

parable merely because it is subordinate to or requires a sharing of responsibility with an employee of the successor company, or receiver, who holds the practical equivalent of Employee's present position; and

2. Employee remains employed by a successor company or receiver for a period of six (6) months from the date of the commencement of such employment.

IT IS FURTHER AGREED that severance compensation payable under this Contract shall be paid upon the earlier of:

1. The failure or refusal of the successor company or receiver to offer Employee a comparable position and compensation.

2. The involuntary termination of Employee by the successor company or receiver within six (6) months of the merger, sale or commencement of receivership proceedings, or their equivalent.

3. The involuntary demotion of Employee to a position or compensation not comparable with Employee's present position and compensation within six (6) months of the merger, sale, or commencement of receivership proceedings, or their equivalent.

IN WITNESS WHEREOF, the parties hereto have signed this Contract on the 24th day of February, 1982.

Fidelity Savings and Loan Association

By /s/ Karen N. Manning
Karen N. Manning
Title Executive Vice President-Secretary

"Association"

By /s/ John H. Meyer
John H. Meyer
"Employee"

EXHIBIT B

Fidelity Savings and Loan Association
Established 1921
2000 Franklin Street
Oakland, California 94612
415 271 1700

A. C. Meyer, Jr.
President

June 1, 1981

John H. Meyer

Dear Jack:

I am pleased to announce that the Board of Directors has approved a Stock Appreciation Plan to compensate key employees for their past efforts and to enable them to share in the future growth of Fidelity.

I want you to know that the Board of Directors recognizes and appreciates your contribution to the Company and the difficulties that the current economic conditions present to the fulfillment of your responsibilities. In order to show their appreciation in a material way, the Board has approved the Stock Appreciation Plan.

Briefly, under this Plan, you will be paid a cash bonus based on the increase in the price of Fidelity Financial Corporation's common stock during the term of the Plan times the number of units (equivalent to shares of stock) granted you. There is also a provision for a minimum payment in the event of a sale or merger of Fidelity. Attached is a detailed explanation of the Plan, together with an Example illustrating how the Plan works. As you will see, the figures used in the attached Example are purely hypothetical as the value of the stock could be higher or lower on the given date. Further, in any event, you will receive a minimum of $3.00 per Unit, based on

your vested interest if the company is sold, merged or liquidated, or the value of the stock does not appreciate by $3.00, assuming you have not left Fidelity prior to June 1, 1982.

The Company is not in a position to grant this to everyone, although we do appreciate each person's efforts. But, as this Plan includes only a few of the key employees, we must ask that you keep your participation confidential.

Thank you for your past efforts and continued support.

Sincerely,

/s/ A. C. Meyer, Jr.
A. C. MEYER, JR.

EXAMPLES OF EXERCISE OF RIGHTS UNDER STOCK APPRECIATION PLAN

Date of Grant:		June 1, 1981
Number of Units:		1,000
Value per Unit at Grant Date:		$ 6.00
Stock Prices:	August 1, 1984	$15.00
	August 1, 1985	20.00
	August 1, 1986	25.00

1. Employee claims appreciation on Units vested as follows:

August 1, 1984—600 Units (3/5) at $ 9 ($15-6)	$ 5,400
August 1, 1985—200 Units (1/5) at $14 ($20-6)	2,800
August 1, 1986—200 Units (1/5) at $19 ($25-6)	3,800
TOTAL APPRECIATION CLAIMED	$12,000

2. Employee accumulates Units and claims appreciation on August 1, 1986:

1000 Units at $19 ($25-6)	$19,000

3. Sale of Fidelity is consummated on July 31, 1983 for $12 per share. Employee has claimed no appreciation:

Employee receives the greater of:

a. Units vested, 400 (2/5) at $6 ($12-6)	$ 2,400
b. Total Units, 1,000 at $3	3,000

EXPLANATION AND TERMS OF STOCK APPRECIATION PLAN

In a Stock Appreciation Plan employees are granted units equivalent to shares of a Company's stock at a stated value per unit and receive cash payments in the amount of any per share increase in the market price of the Company's stock over the issue price of the appreciation unit during the term of the Plan times the number of units granted and vested.

Under Fidelity's Plan, 1/5th of the total units granted vest in the employee on January 1, 1982, and 1/5th annually thereafter so the employee is fully vested 4 years and 7 months from the date of grant. Appreciation is measured by changes in the market price of Fidelity Financial Corporation's common stock. The Plan terminates one (1) year from the date of last vesting.

Employees may claim the appreciation on the vested portion of their units at any time during the term of the plan and can accumulate any or all of their vested units and claim the appreciation at the termination of the Plan.

Employees terminating their employment with Fidelity at any time later than one (1) year after the original grant date, will be entitled to the greater of:

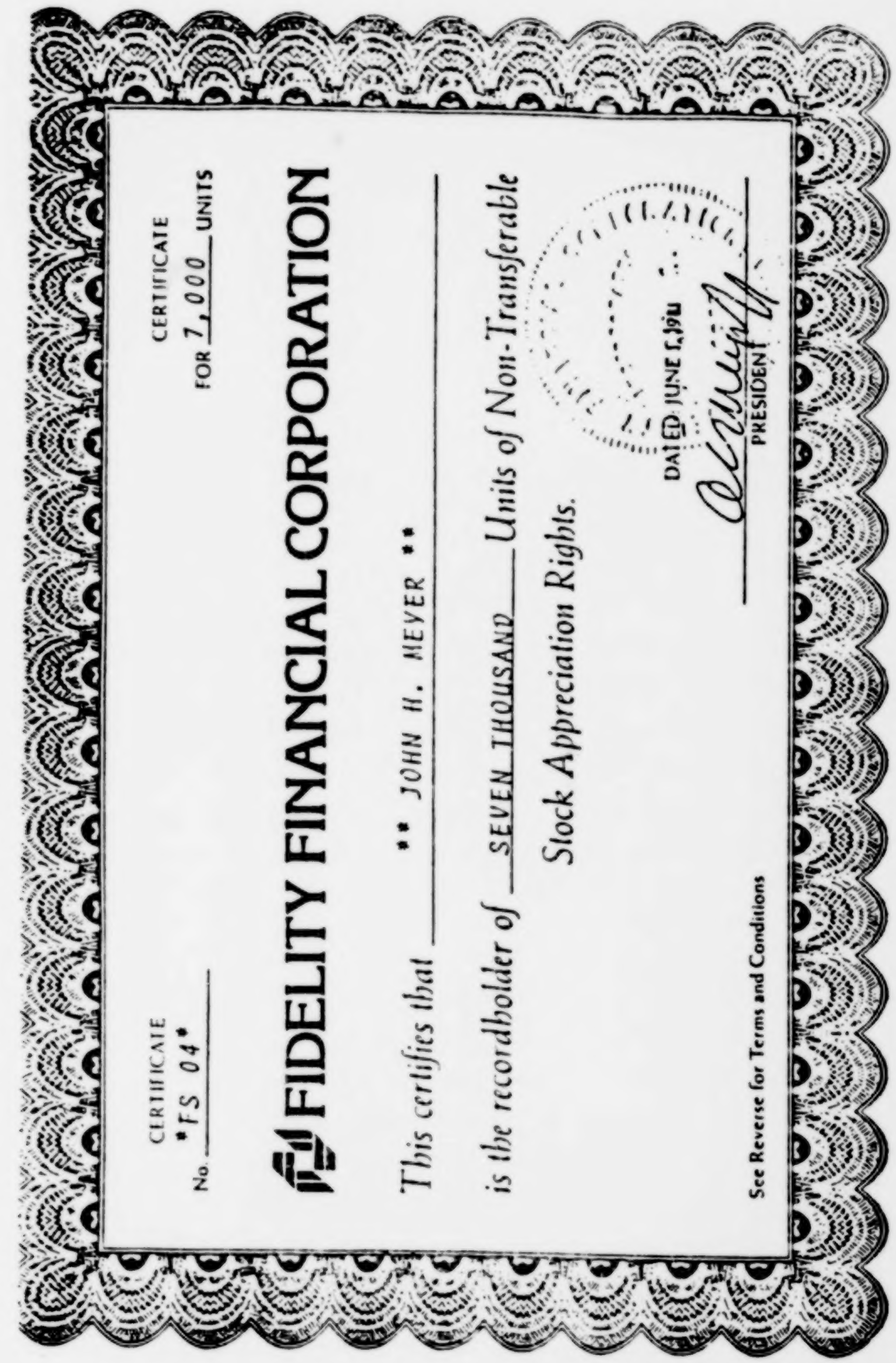
1. The remaining vested portion of their units, times the appreciation the market price per share represents over the unit grant value; or

2. The remaining vested portion of their units times $3.00.

In the event of a merger or sale of Fidelity, employees are entitled to the greater of:

1. The remaining vested portion of their units times the appreciation the merger or sale price per share represents over the unit grant value; or
2. Their total units granted, less those on which they have claimed appreciation, times $3.00.

This amount would be payable at the time a merger or sale was consummated.


CERTIFICATE No. *FS 04*

CERTIFICATE FOR 7,000 UNITS

FIDELITY FINANCIAL CORPORATION

This certifies that ** JOHN H. MEYER **

is the recordholder of SEVEN THOUSAND Units of Non-Transferable Stock Appreciation Rights.

DATED JUNE 1, 19[illegible]

PRESIDENT

See Reverse for Terms and Conditions

TERMS AND CONDITIONS

1. DATE OF GRANT—6/1/81

2. BASE PRICE—$6.00

3. VESTING RIGHTS

   20%—1/1/82
   20%—1/1/83
   20%—1/1/84
   20%—1/1/85
   20%—1/1/86

4. TERM OF PLAN—6/1/81 to 12/31/86

5. EXERCISE RIGHTS

   A. Accumulative during term of plan

   B. Any and all of the vested rights are exercisable at the employee's option.

   C. Vested rights exercisable within 90 days of termination of employment.

   D. Vested rights exercisable by estate of employee within 90 days of death, if employee dies while employed by Fidelity Savings and Loan Association or its affiliates.

6. MINIMUM APPRECIATION

   $3.00 per unit minimum appreciation to be paid in the following circumstances:

   A. In the event of a sale or merger on total units granted less number of units exercised. Payable at consummation of sale or merger.

   B. In the event of termination of employment after June 1, 1982, on total unexercised vested units.

Exhibit C

FIDELITY SAVINGS

PERSONNEL POLICIES AND PROCEDURES

TERMINATION AND EXIT INTERVIEW

No. Section 3.07
Page 1 of 2
Date Rev. 10-81

1. *Involuntary Termination*

   a. Except during the probationary period or in cases of employee misconduct, supervisors are to advise employees of matters that might lead to subsequent release. Details of the warning(s) are recorded in written memoranda or on Counseling/Disciplinary Review forms.

      1. Upon release for any reason other than for flagrant misconduct, an employee is paid for any vacation earned but not yet taken. Any vacation taken in excess of the amount earned is deducted from the employee's final pay check. Vacation hours due, or vacation hours in excess are to be entered on the final Personnel Change Notice.

      2. If termination is not the fault of the employee, he or she may be eligible for State Unemployment Insurance provided completely by Association contributions.

   b. Employees, other than officers, terminated solely for the benefit of the Association (no negative

aspects of performance) receive severance pay according to the following schedule.

Period of Employment	Severance Pay
Less than one year of service	none
Continuous service of one year but but less than two	1 week
Continuous service of two years but but less than three	2 weeks
Continuous service of three years but but less than five	3 weeks
Continuous service of five years or more	to be determined by the President or his designee.

c. Severance terms for officers who are terminated for the sole benefit of the Association are determined by the President or his designee. (Officers are department heads, and those who are Vice Presidents and above.)

Affidavit of Service by Mail (C. C. P. 1013a)

(Must be attached to original or a true copy of paper served)

STATE OF CALIFORNIA)
) ss.
COUNTY OF ALAMEDA)

No. C 83 2204 JPV

LINDA D. JOHNSON being sworn, says that he is a citizen of the United States, over 18 years of age, a resident of ALAMEDA County and not a party to the within action.

That affiant's residence (business) address is

HARDIN, COOK, LOPER, ENGEL & BERGEZ
One Kaiser Plaza, Suite #2300
Oakland, California 94612

That affiant served a copy of the attached

SECOND AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

by placing said copy in an envelope addressed to

SEE ATTACHED SERVICE LIST

which envelope was then sealed and postage fully prepaid thereon, and thereafter was on June 22, 1984, deposited in the United States mail at OAKLAND. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 22, 1984 at OAKLAND, California.

/s/ Linda D. Johnson (Signature)
LINDA D. JOHNSON

SERVICE LIST

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Civil Order No. C-83-2204 JPV

John H. Meyer, plaintiff

vs.

Fidelity Savings & Loan Association, et al.,
defendants

ORDER GRANTING MOTION TO DISMISS IN PART

[Filed Jan. 23, 1985]

This matter came on regularly for hearing on September 27, 1984, the Honorable J.P. Vukasin, Jr., presiding. After duly considering the oral and written arguments, the court makes the following determinations.

FACTS

On April 13, 1982, the California Savings & Loan Commissioner seized the assets and liabilities of Fidelity Savings & Loan Association (Fidelity), and in order to liquidate Fidelity, appointed the Federal Savings & Loan Insurance Corporation (FSLIC) as state receiver. At the same time, the FSLIC was also appointed sole federal receiver by the Federal Home Loan Bank Board (FHLBB), pursuant to 12 U.S.C. § 1729(c)(2). The FSLIC appointed Robert Pattullo as its Special Representative. That same day, immediately following the seizure, plaintiff John Meyer was terminated from his employment at Fidelity by the FSLIC and Pattullo.

The FSLIC, a federal corporate instrumentality, was therefore the assignee and conservator of certain alleged

liabilities for unpaid wages and benefits of terminated Fidelity employees, pursuant to the regulatory takeover. Other defendants are successor corporate entities to whom Fidelity's assets and liabilities have been transferred, as well as employees of the State of California who were involved in the inital liquidation of Fidelity and the appointment of the FSLIC as state receiver.

Fidelity's distressed financial condition was precipitated by its administration of questionable loan policies.[1] Plantiff Meyer, the brother of Fidelity's president, was employed by Fidelity from 1966 until the takeover, serving as Executive Vice President of Branch Operations during the last two years.

In his Second Amended Complaint, Meyer contends that over the course of his sixteen years of employment, an implied contract for permanent employment arose between himself and Fidelity, such that Meyer was guaranteed he would not be terminated without a showing of "good cause." As evidence of this agreement Meyer points to the commendations, wage increases and bonuses he received, his participation in a Stock Appreciation Plan, the existence of a written severance agreement between himself and Fidelity, and Fidelity's specific discharge policies. Fideiity's policies and conduct allegedly gave plaintiff a legitimate expectation of continued and permanent employment, and he was denied minimal due process rights by the manner of his termination. Further, Meyer claims that all the defendants tortiously breached the implied contractual right of good faith and fair dealing by terminating him without just cause and by failing to pay certain benefits owed upon termination. Meyer also alleges violations of his civil rights, and seeks a declaratory judgment ordering the rights and obligations of the parties regarding the amounts allegedly due under

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[1] *See Fidelity Savings & Loan Association v. Federal Home Loan Bank Board*, 689 F.2d 803, 805 (9th Cir. 1982).

certain agreements formed during the course of Meyer's employment by Fidelity.

Defendants FSLIC, Pattullo, and the United States have moved to dismiss the complaint for lack of subject matter jurisdiction, and for failure to state a claim upon which relief can be granted. Federal Rules of Civil Procedure 12(b)(1), (6).

DISCUSSION

COUNT I

In Count I of his Second Amended Complaint, plaintiff Meyer alleges that FSLIC and Pattullo violated the Fifth and Fourteenth Amendments to the United States Constitution by depriving him of property without due process of breaching the implied employment contract and wrongfully terminating him.

It is essential to note at the outset that plaintiff has alleged deprivations of two distinct property rights. Insofar as plaintiff contends that the actions of the FSLIC and Pattullo deprived him of his right to receive certain payments that had accrued prior to his termination, such as unpaid wages, stock options, and vacation benefits, plaintiff's constitutionally based cause of action must survive defendants' motion to dismiss. Meyer has sufficiently established that an implied employment agreement between himself and Fidelity existed at the time of the regulatory takeover. He has therefore succeeded in establishing the source by which his claim of entitlement to unpaid benefits is created and defined. Such an interest in property is fully protected by the Constitution and the laws of the State of California, and may not be stricken or truncated by the action of a federal instrumentality, without according the holder of such property the minimal right to due process of law.

Plaintiff's further contention, that the implied contract created a legitimate entitlement to continued and per-

manent employment which is also subject to due process protection, presents an altogether different issue. In order to invoke procedural due process guarantees, a person must have a "legitimate claim of entitlement" to a property interest that stems from "an independent source such as state law." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Meyer asserts that he had more than a mere desire or abstract need for continued employment, but rather an enforcible expectation of it, based on the length of his employment, promotions and wage increases received, company policies regarding discharge, "promises" of permanent employment, and extension of benefits to him by his superiors at Fidelity.

California Labor Code Section 2922 provides that "an employment, having no specified term, may be terminated at the will of either party on notice to the other." However, there have been a number of judicially created exceptions to this doctrine that limit an employer's power of dismissal.

Plaintiff has pleaded a number of allegations which, if found to be true, will support a finding that defendants breached the implied covenant of good faith and fair dealing. In *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443 (1980), a judgment of dismissal was overturned where plaintiff adequately alleged a viable cause of action for wrongful discharge based upon breach of an implied covenant of good faith and fair dealing, where the employee demonstrated longevity of service and reliance on employer policies and procedures. Here, Meyer has alleged performance of commendable service for sixteen years, as well as the existence of and communication to him of specific promises of continued, secure employment, as well as policies governing employee termination only upon a showing of good cause. The *Cleary* court emphasized that its findings only pertained to defendants' demurrers, and did not in any way shift the ultimate burden of proof borne by plaintiff. *Id.* at 456.

Plaintiff has also sufficiently stated a claim of entitlement based on breach of an implied-in-fact covenant to terminate only for just cause. The criteria applied in analyzing this exception to California's statutory "termination-at-will" provision include duration of employment, commendations and promotions received, lack of criticism of work performed, assurances given, and employer's policies. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311 (1981).

Defendants' reliance on *Newfield v. Insurance Company of the West*, 156 Cal. App. 3d 440 (1984), is misplaced. In *Newfield*, the court dismissed a wrongful termination suit based on the implied contract exception because plaintiff's only allegation was the promise of a "permanent career." Unlike Meyer, the plaintiff in *Newfield* did not allege the existence of personnel policies that would support a cause of action, he had worked for his employer a mere two years, and his work had been frequently criticized.

Meyer and Fidelity entered into an Employment Severance Contract a mere seven weeks prior to the federal receivership. Plaintiff contends this agreement evidences the covenant between himself and Fidelity to terminate only for a good cause. Defendants urge this Court to find that Meyer was motivated to create this instrument by his fear and knowledge that his employment would not survive the imminent regulatory takeovers. Certainly this inference is extremely compelling, but does not represent the only plausible conclusion. For example, it is possible to infer that the agreement represents an incentive by Fidelity to retain key personnel. It cannot be summarily accorded defendants' interpretation at this stage of the litigation.

B. *Effect of Federal Regulation*

Plaintiff has stated facts supporting the existence of an implied employment agreement with Fidelity, based upon judicial expansion of California's termination at will statute. But before this right can ripen into a legitimate claim of entitlement to permanent employment, such as would support and sustain plaintiff's claims for damages due to lost income, it is necessary to assess the impact of the federal regulatory interest in this area.

The legislation creating the FSLIC conferred a great deal of discretion and power to ensure the safety and soundness of the savings and loan industry. 12 U.S.C. §§ 1724 *et seq.* The fact that Fidelity was not a federally-chartered institution does not diminish this interest. The insurance provided by FSLIC is extended to savings accounts in state-chartered associations as well. The financing of the construction and purchase of homes depends in large part upon the financial integrity of FSLIC and its continuing ability to insure the stability of the entire savings and loan industry. When the Bank Protection Act of 1968 [2] was passed, FSLIC's receivership powers with regard to state-chartered institutions were expanded, because "the FSLIC has a vital stake in the proper management and disposal of the assets" of an association in receivership. S. Rep. No. 1263, 90th Cong., 2nd Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News, at p. 2536. (S. Rep.) The FSLIC was authorized to liquidate an institution in default as orderly a fashion as possible, to maintain public confidence, and "to make such other disposition of the matter as it deems to be in the best interests" of the institution, its savers, and the FSLIC. 12 U.S.C. § 1729(c)(3)(B).

The court need not rely upon these generally-stated grants of power, however, to determine the propriety of the actions taken by FSLIC and Pattullo during the

[2] P. L. No. 90-389; 82 Stat. 294 (1968).

emergency conditions present on April 13, 1982. Employment contracts entered into between insured institutions and their employees are specifically governed by 12 CFR § 563.39, in effect at the time of Meyer's termination,[3] which provides in pertinent part as follows:

> An insured institution shall not enter into an employment contract with any of its officers or other employees if such contract would constitute an unsafe or unsound practice. . . . [T]he making of such an employment contract would be an unsafe or unsound practice if such contract could lead to material financial loss or damage to the insured institution or could materially interfere with the exercise by the members of its board of directors of their duty or discretion provided by law, charter, bylaw or regulation as to the employment of an officer or employee of the institution. This may occur, depending upon the circumstances of the case, where an employment contract provides for an excessive term or does not contain an appropriate termination for cause provision.

Meyer argues that the terms of the regulation provide only subjective tests for determining whether his implied contract represents an "unsafe or unsound practice" on

[3] The regulation was subsequently amended. The present version, 12 CFR § 563.39(a), effective 1983, provides in part that "[a]ll employment contracts shall be in writing and shall be approved specifically by an institution's board of directors." Meyer does not allege that his contract for "permanent" employment was committed to writing, nor that it was specifically approved by Fidelity's board. Rather, he claims that certain writings are *evidence*, of an implied contract for permanent employment with Fidelity. Had this regulation been in force at the time of Meyer's termination, our inquiry would be at an end, for Meyer's claim of entitlement would rest upon a contract that is null and void in terms of providing a specific term of employment. *See* 47 Fed. Reg. 17472, April 23, 1982.

the part of Fidelity's board, and that the court is precluded from making factual determinations at this point in the proceedings.

The court is prohibited from making factual determinations only where more than one reasonable inference may be drawn. If the alleged "contract" were upheld as valid, it is clear that Fidelity's directors had bound themselves in a way that hamstrung their ability to operate the institution in a proper manner. The federal regulation explicitly curtails the discretion of an insured institution's directors in this narrow area pertaining to employment contracts. If the directors, as Meyers alleges, impliedly agreed to employ Meyer "permanently," that contract's "excessive term" represents material interference with the directors' discretion. Even as a matter of basic business judgment, the Severance Contract upon which Meyer heavily relies to establish the existence of an implied-in-fact agreement contains absolutely no incentive for Meyer to do all that was possible to rectify the situation that eventually led to the receivership. The Severance Contract benefits accrued whether Fidelity merged, refinanced, or was liquidated. The only consideration offered in return was Meyer's promise to "continue employment" with Fidelity. And yet, by plaintiff's own admission, the implied employment contract was created over a period of continuous service, prior to the parties' execution of the Severance Contract in February, 1982. Therefore, as Meyer had bound himself to "continue employment" at Fidelity prior to its execution, the Severance Contract does not contain any new consideration that would serve to satisfy the basic requirements for finding a valid contract, namely, an exchange of mutually enforcible promises.

Despite Meyer's contentions that he himself was not responsible for the conditions that led to Fidelity's default, his own exhibits attached to the Second Amended Complaint describe him as a "key employee," entitling

him to certain benefits not available to all employees. The authority granted to the FSLIC upon takeover of an insured institution is at least as broad as that power that rests with the directors of a privately-run corporation. Plaintiff cannot, on the one hand, argue that the FSLIC somehow abridged the business judgment of Fidelity's directors by terminating him, while on the other hand, attack the FSLIC for exercising *its* lawful statutory and regulatory authority to organize a new financial institution by dismissing Fidelity's senior management.

While FSLIC's actions were drastic, we do not find in its choice of remedies any element of abuse of discretion, lack of legal support or absence of factual justification, sufficient to lead to the conclusion that plaintiff had sustained an actionable deprivation of constitutional rights. We agree with defendants' assertion that the FSLIC's mandate in regulating a failing insured institution cannot be subject to any efforts by that institution's management to secure and entrench its own position.

While California law has been interpreted as granting "at will" employees certain process and tenure rights, state law cannot provide any independent source of power that would hinder FSLIC's mandate to manage an ailing savings and loan association. Preemption occurs where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Therefore, insofar as plaintiff claims that he had an enforcible contract that created a legitimate expectation of continued employment at Fidelity, that contract is void, and insufficient to sustain a claim of a constitutionally protected property interest.

C. *Pattullo's Immunity*

In the Second Amended Complaint, (¶¶ 13, 16) Meyer admits that Pattullo acted within the scope of his authority as an employee of FSLIC. Defendants argue

that Pattullo, as a federal official, enjoys qualified immunity from civil suit based on alleged constitutional violations. They properly cite the prevailing policy consideration pervading this doctrine, that the public interest requires freedom of decision for its government servants to enforce the laws. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). However, the Supreme Court has consistently held that this doctrine is prematurely applied at this stage of the pleadings. In *Schuer v. Rhodes*, 416 U.S. 232 (1974) involving immunity for state officials, the Court overturned the Rule 12(b)(1) dismissal of a case seeking monetary damages for civil rights violations precisely because the issue facing a district court in reviewing the sufficiency of a complaint "is not whether a claimant will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Id.* at 236. Authorities cited by defendants deal with liability of federal officials for *tort* claims, or else define "early resolution" of the claims as occurring at the summary judgment stage.

Therefore, Meyer's constitutional claim against Pattullo as to Count I must survive, to the same limited extent as that against the FSLIC.

Count II

In Count II, Meyer alleges that the defendants, acting individually and in concert, violated his civil rights by their wrongful breach and termination.

The Civil Rights Act 42 U.S.C. § 1983, applies to agencies and individuals acting under color of state law. The conspiratorial acts alleged by Meyer are vague and mostly conclusionary. Notwithstanding this problem, plaintiff alleges that FSLIC and Pattullo were acting as "State Receivers," under color of California law, thereby making § 1983 applicable.

The responsibility for regulation of state savings and loan associations has been divided between the states and

the federal government. S. Rep., at 2538. While the legislative history contemplates action by the State to place the association in custody prior to federal intervention, it is equally clear that the FSLIC, whose sole power and authority is by virtue of federal legislation, cannot act under color of state law.

Meyer's Second Amended Complaint, at ¶ 13 alleges that Pattullo "is at all times . . . employed by the [FSLIC] acting as special representative for the [FSLIC] [Fidelity]." Section 1983 does not address liability of federal officials, nor do the conspiracy statutes in this area provide a cause of action against a federal official acting under color of federal law.

Therefore, the federal defendants are not subject to suit under 42 U.S.C. § 1983, and this Count must be dismissed for failure to state a claim upon which relief can be granted.

Count III

In Count III, Meyer contends that defendants FSLIC, Pattullo, and the United States, acting individually and in conspiracy with each other and with the other defendants, tortiously violated the implied covenant of good faith and fair dealing by terminating him without good cause, in breach of the alleged employment contract he had with Fidelity.

Resolution of the motions to dismiss this Count must be based on the interplay between the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671 *et seq.*, and FSLIC's enabling legislation. The latter statute provides that the FSLIC has power "to sue and be sued." 12 U.S.C. § 1725(c)(4). Plaintiff argues that any sovereign immunity enjoyed by the federal defendants is therefore waived by the operation of this provision.

The FTCA, at 28 U.S.C. § 2679(a), was made the exclusive remedy with respect to alleged torts by federal government agencies, irrespective of claims invok-

ing the district court's general jurisdiction over civil actions complaining of torts by the United States or its employees.

Plaintiff relies on *First Empire Bank v. FDIC*, 572 F. 2d 1361 (9th Cir. 1978), to support his argument that the FTCA is inapplicable. There, the limitations imposed by the FTCA on suits brought against federal instrumentalities were ignored. However, the issue of suability was not addressed in *First Empire*, and that decision contravenes a 1974 Ninth Circuit opinion, *Safeway Portland E.F.C.U. v. FDIC*, 506 F. 2d, 1213, holding that the FTCA is the exclusive remedy governing tort suits brought against federal agencies. *Id.* at 1215. *First Empire*'s aberrational nature with respect to this issue is underscored by the subsequent refusal by many Ninth Circuit district courts to follow it,[4] as well as contrary results reached by at least three other federal circuits.[5] Therefore, we turn now to the FTCA provisions.

The FTCA defines the limits of the Congressional waiver of sovereign immunity against the United States and its agents and instrumentalities in tort claims. Jurisdiction is limited to cases where the Government has consented to be sued. *Morris v. United States*, 521 F.2d 872 (9th Cir. 1975). If Meyer's tort claim falls within one of the exceptions to the waiver, as delineated in 28 U.S.C. § 2680, then the district court lacks subject matter jurisdiction over the claim.

Plaintiff has satisfied one jurisdictional prerequisite for initiation of a suit under the FTCA by presenting his tort claim to the FSLIC, and thereafter receiving the

[4] *See, e.g., First Savings & Loan Association v. First Federal Savings & Loan Association*, 531 F. Supp. 251, 254 (D. Hawaii 1981).

[5] *See Edelman v. FHA*, 382 F.2d 594 (2d Cir. 1967); *FDIC v. Citizens Bank & Trust Co.*, 592 F.2d 364 (7th Cir. 1979); *Freeling v. FDIC*, 221 F. Supp. 955 (W.D. Okl. 1962), *aff'd* 326 F.2d 971 (10th Cir. 1963).

agency's denial. 28 U.S.C. § 2675(a). (*See* plaintiff's Second Amended Complaint, at ¶ 47).

The FSLIC is clearly a federal agency within the meaning of 28 U.S.C. § 1346(b). The extent of its liability under claims sounding in tort is only as extensive as the FTCA allows. A federal agency is not suable *eo nomine* under the FTCA—rather, an action can only be brought against the United States. 28 U.S.C. § 2679 (a); *Newberg v. FSLIC*, 317 F. Supp. 1104, 1106 (N.D. Ill. 1970). As the FTCA precludes actions brought directly against the FSLIC, FSLIC's defenses based on immunity need not be addressed. FSLIC must be dismissed as a defendant in Count III, for failure to state a claim upon which relief can be granted.

28 U.S.C. § 2680(a) provides an exception to the waiver of immunity as to claims based upon the exercise of discretionary functions or duties on the part of the federal agency or employee. Plaintiff contends that a motion to dismiss is not the appropriate time in which to examine the discretionary function exception, because the determination of whether or not the claim is actionable depends on whether the discretionary decision was made at the "operational" or at the "planning" level. *Dalehite v. United States*, 346 U.S. 15 (1953).

Plaintiff's assertion that there is no express statutory provision allowing FSLIC to discharge an employee is correct.[6] As noted, however, FSLIC and its Special Representative have been granted broad discretion to carry out their statutory responsibilities in restoring a seriously troubled insured institution. 12 U.S.C. § 1729(b), (f). The kind of mechanical test that plaintiff proposed for determining the amenability of a federal agency and its employees to a tort action has recently been rejected in *United States v. Varig Airlines*, 81 L. Ed. 2d 660 (1984),

[6] Distinguish the provisions of the Federal Home Loan Bank Act, 12 U.S.C. § 1432(a), authorizing those Banks "to dismiss at pleasure" certain employees as they see fit.

where the Supreme Court held "it is the nature of the conduct, not the status of the actor, that governs whether the discretionary function exception applies." *Id.* at 674. The court finds that the challenged acts of Pattullo and the FSLIC are of the nature and quality that Congress intended to shield from tort liability in enacting 28 U.S.C. § 2680(a), to prevent the hindrance or thwarting of the government agency's ability to fulfill its statutory and regulatory mandate. The exception covers not only the action taken by governmental agencies, but also action taken by subordinates, such as Pattullo, who carry out discretionary policy judgments in accordance with official directions. Their conduct, as well, cannot be actionable, when performed pursuant to their mission to regulate the business affairs of a federally insured institution. As the activities of FSLIC and Pattullo can be characterized as "discretionary," this court lacks jurisdiction to entertain Meyer's tort claims, and they must be dismissed.

Count V

In Count V, Meyer claims that the FSLIC and Pattullo, *inter alia,* breached the Severance Agreement, Severance Plan, and Stock Appreciation Plan by failing to pay benefits owed to plaintiff upon termination of his employment with Fidelity, and in so doing, breached the implied covenant of good faith and fair dealing.

Insofar as this count claims interference by federal agencies and officials with rights held by Meyer pursuant to his alleged employment contract with Fidelity, it is barred by the application of 28 U.S.C. § 2680(h). This provision of the FTCA excerpts from the waiver of sovereign immunity "any claim arising out of . . . interference with contract rights." Further, as analyzed under the discussion of Count III, the district court has no jurisdiction over tort-based claims where the FSLIC and Pattullo have not consented to be sued, 28 U.S.C. §§ 2679(a), 2680(a), and where the discretionary func-

tion exception has been found applicable. Given these conclusions, we find no need to address the merits of plaintiff's argument that the FSLIC was a "party" to the alleged contract between Meyer and Fidelity.

Plaintiff will still have recourse to recover any benefits legitimately due him for services rendered pursuant to the alleged agreements he executed with Fidelity, prior to his termination, by maintaining his action against the remaining non-federal defendants. Further, as discussed under Count I, *supra,* plaintiff's constitutional claim with regard to this property survives against these moving parties.

Count VIII

In Count VIII, Meyer prays that the court render a declaratory judgment regarding the legal relations of plaintiff to each of the named defendants. As noted in the discussion under Count I, plaintiff has stated a cognizable cause of action against FSLIC and Pattullo with regard to certain benefits that had allegedly accrued prior to his termination. Insofar as plaintiff seeks a judicial determination of the identities of those entities potentially responsible for the satisfaction of those claims, this cause of action must survive defendants' motion to dismiss.

CONCLUSION

In accordance with the foregoing:

(1) Count I is hereby DISMISSED as to plaintiff's claims respecting the breach of an alleged contract for continued employment;

(2) Count II is DISMISSED;

(3) Count III is DISMISSED;

(4) Count V is DISMISSED as to plaintiff's claims concerning alleged breach of the covenant of good faith and fair dealing and his tort-based claims;

(5) In all other respects the complaint stands.

IT IS SO ORDERED.

Dated: Jan. 22, 1985

/s/ J. P. Vukasin, Jr.
J. P. VUKASIN, JR., Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 83-2204 JPV

JOHN N. MEYER, PLAINTIFF

v.

FIDELITY SAVINGS AND LOAN ASSOCIATION, ET AL.,
DEFENDANTS

MEMORANDUM OF OPINION AND ORDER REINSTATING DEFENDANTS FSLIC AND PATTULLO UNDER COUNT I OF THE SECOND AMENDED COMPLAINT

[Filed Dec. 5, 1986]

On October 9, 1986, this matter came before the Court, the Honorable J.P. Vukasin, Jr., presiding for hearing on the Court's *sua sponte* reconsideration of its January 23, 1985 Order Dismissing Counts I and III of the Second Amended Complaint against defendants United States, FSLIC and Robert Pattullo. Appearing on behalf of plaintiff was Gennaro A. Filice III, appearing for defendant United States was Lynn Richardson, AUSA, and appearing on behalf of defendants FSLIC and Pattullo was Daniel Johnson, Jr. At the conclusion of oral arguments the Court issued an oral ruling which is memorialized as follows:

FACTS

As a result of questionable loan policies, Fidelity Savings & Loan ("Fidelity Savings") was in financial difficulties in early 1982. On April 13, 1983, the California

Savings & Loan Commissioner seized Fidelity Savings' assets and appointed the Federal Savings & Loan Corporation ("FSLIC") as state receiver. At the same time, the FSLIC also was appointed the sole federal receiver by the Federal Home Loan Bank Board, pursuant to 12 U.S.C. section 1729(c)(2); Robert Pattullo was appointed the FSLIC's special representative.

That same day, plaintiff Meyer was terminated from his job at Fidelity Savings by the FSLIC acting through Pattullo. Fifty-six year old Meyer, vice president in charge of branch operations, had been employed by the savings and loan for sixteen years. Meyer was offered no reason for the firing, nor was he given an opportunity for a hearing. Also on April 13, 1983, the newly-created federally-chartered Fidelity Federal Savings & Loan ("Fidelity Federal") and the FSLIC as receiver, executed an "Acquisition Agreement", in which Fidelity Federal and the FSLIC as receiver purchased virtually all of Fidelity Savings' assets and assumed virtually all of its liabilities. The next day, a "Receivers Agreement" was executed by which the FSLIC acquired the remaining assets of Fidelity Savings and expressly assumed and undertook to pay all liabilities of the FSLIC as receiver which were not assumed by Fidelity Federal the day before. On September 28, 1982, the FSLIC and FSLIC as receiver transferred the assets and liabilities of Fidelity Federal to Citicorp Bank, which in turn transferred the assets and liabilities to its wholly-owned subsidiary, Citicorp Savings and Loan. The former Fidelity Savings is now known as Citicorp Savings and Loan.

Count I of the Second Amended Complaint alleges that the FSLIC and Pattullo, by their actions, abrogated plaintiff's Fifth and Fourteenth Amendment rights by depriving plaintiff of a valuable property interest without due process of law. Count III alleges against the FSLIC, Pattullo and the United States, tortious breach of an implied long-term employment contract and breach of an implied covenant of good faith and fair dealing contained therein. On September 27, 1984, defendants FSLIC and Pattullo moved to dismiss Count I and the United States, the FSLIC and Pattullo moved to dismiss Count III. The matter was taken under submission and on January 23, 1985, this Court granted in part the motion to dismiss Count I and dismissed Count III in its entirety against all three movants.

In April, 1986 defendants Citicorp (as successor-in-interest to Fidelity Federal) and Fidelity Savings moved for summary judgment, which this Court granted as to Citicorp and denied as to Fidelity Savings. Prior to issuing that decision, this Court issued an Order Regarding Sua Sponte Reconsideration of its 1985 Order dismissing the FSLIC and Pattullo in part from Count I and dismissing the United States, the FSLIC and Pattullo *in toto* from Count III.

DISCUSSION

Count I

Plaintiff alleges that his termination violated the Fifth and Fourteenth Amendments by depriving him of a property right without the procedural due process to which he was entitled. A property interest, to warrant constitutional protection, must comprise a legitimate claim of entitlement and not a mere expectation of future benefits. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Legitimate claims to such property interests are created, not by the constitution, but by independent sources such as state law. *Id.* This Court recognizes that the violation of two distinct property rights is alleged in Count I. First, the plaintiff's right to receive benefits already earned (e.g., back wages, stock options and vacation pay) allegedly was violated. The portion of Count I dealing with this specific property right constitutes a proper claim, and this Court, in its Order of January 23, 1985, properly refused to dismiss this portion of the claim.

The second property right claimed by plaintiff arises out of his implied right to continued and permanent employment. Under certain facts, California common law recognizes the expectation of long-term employment as a cognizable claim of entitlement. This is an exception to the "at will" termination doctrine codified by California Labor Code § 2922. In *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443 (1980), a judgment of dismissal was overturned where plaintiff alleged a viable claim for wrongful discharge based upon a breach of the implied covenant of good faith and fair dealing. The court based its holding on the longevity of plaintiff's employment and on the employer's policy of terminating its employees only where good cause existed. Here, Meyer has alleged performance of commendable service for sixteen years along with the existence of Fidelity Savings' policy of termination only upon a showing of good cause. Plaintiff has stated a proper claim under the implied right to continued employment as described in *Cleary*.

Plaintiff has also sufficiently stated a claim based on an implied-in-fact covenant to terminate only for good cause. In *Pugh v. See's Candies, inc.*, 116 Cal. App. 3d 311 (1981), the court found that some employment contracts contain an implied promise that the employer will not act arbitrarily in its dealing with employees. There, the court found an exception to California's statutory "termination-at-will" provisions by giving weight to the factors of duration of employment, commendations and promotions received, lack of criticism, and assurances given by the employer that employment was secure. Here, plaintiff has alleged facts sufficient to state a claim under the *Pugh* factors. Recovery under the doctrines of *Cleary* and *Pugh* has been recognized in this circuit. *Russell v. Massachusetts Mutual Life Insurance Co.*, 722 F.2d 482, 492-93 (1983), *rev'd. on other grounds*, 105 S. Ct. 3085 (1985); *Cancellier v. Federated Department Stores*, 672 F.2d 1312, 1318 (1982), *cert. denied*, 103 S. Ct. 131 (1982).

Defendants contend that the state-created right to long-term employment is preempted by the federal statutes granting the FSLIC broad discretionary powers to rescue failing financial institutions. *See* 12 U.S.C. §§ 1464(d)(6)(c) and 1729(d); *North Mississippi Savings & Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 790 (1986). In *Hudspeth*, a former bank president's compensation agreement with his former employer was terminated by the FSLIC after the institution went into receivership. The court upheld the dismissal of plaintiff's state-based contract claim. *Hudspeth*, however, is not dispositive of the issues before this Court. The plaintiff in *Hudspeth* never alleged a violation of his constitutional rights. *Hudspeth* is nothing more than a state court contract dispute which took on new dimensions when it was removed to federal court. *Id.* at 1099.

Defendants also urge this Court to shift Meyer to the "administrative remedy track" as was done in *Hudspeth*. *Id.* at 1103. Defendants contend that Meyer may petition the Federal Home Loan Bank Board for review, and then if not satisfied, may seek judicial review. Under 12 C.F.R. §§ 569a.8 and 549.4, a receiver must publish a notice to all creditors to present their claims, with proof, on prescribed forms, within 90 days of posting the notice. If the receiver disallows a claim, it must mail notice of denial and reasons therefor to the claimant by certified mail. Plaintiff claims that this required administrative procedure was not made available to him, and that defendants should be estopped from claiming that this procedure is now available, three years after the action was filed. Defendants never contended, until their reply brief was filed one week before this hearing, that any administrative remedy was made available to plaintiff. Nor have they provided this Court with any specifics as to where and when the required notice was published. This Court therefore holds that defendants are estopped from claim-

ing non-exhaustion of administrative remedies. Defendants' arguments under *Cleveland Board of Education v. Loudermill*, 84 L. Ed. 2d 494, 504 (1985), and *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), that the risk of plaintiff's erroneous termination is protected by the adequacy of post-termination remedies, are similarly unavailing. No such remedies or procedures were made available to plaintiff.

More to the point, the FSLIC simply does not have the power to abrogate constitutional rights. 12 U.S.C. §§ 1464 (d)(6)(c) and 1729(d) confer broad discretion upon the FSLIC, but all federal statutes are subject to constitutional limitations. *University For Women v. Hogan*, 458 U.S. 718, 733 (1981); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973); *United States v. Rauh*, 637 F.2d 1205, 1207 (1980), *cert. denied*, 449 U.S. 922 (1980).

Relying on *Fidelity Financial Corp. v. Federal Home Loan Bank*, 792 F.2d 1432 (9th Cir. 1986), defendants contend that because no specific limiting criteria restrain the FSLIC's broad discretionary powers, no property interests are either created or abridged when the FSLIC acts. In *Fidelity Financial*, plaintiff sued the Federal Home Loan Bank ("Bank") after the Bank abruptly cut off regular loan advances it had been making to Fidelity Financial for a number of years. The court upheld the Bank's denial of funding and held that Fidelity Financial had no protectible property interest in receiving regular credit advances because the Bank was under no particularized standards or criteria that significantly constrained the Bank's discretion to deny advances. *Id.* at 1436. Defendants argue that the FSLIC's discretion is even broader than the Federal Home Loan Bank's and that Congress, when it created the FSLIC, intended that no specific limiting criteria should restrain the FSLIC's discretion in terminating employment contracts. *Fidelity Financial* does not apply to this case because the right

to future advances, if any, was created by the Bank, and arose directly out of the Bank's relationship with its customer, Fidelity Financial. In the case at bar, the FSLIC had no role in the creation of plaintiff's property interests. Meyer's property interest is created by California common law and arises out of the relationship between Meyer and defendants FSLIC and Pattullos' predecessor in interest. It is clear that by the Receivership Agreement, the FSLIC expressly assumed the obligations of Fidelity Savings. The FSLIC and Pattullo now claim, in effect, that they had the discretion to dishonor the assumed obligations simply because they were unconstrained by particularized standards. This argument is specious. Defendants have not shown federal interests sufficiently compelling to warrant the abrogation of plaintiff's constitutionally protected property rights.

Therefore, defendants FSLIC and Pattullo should be reinstated as defendants under Count I of the Second Amended Complaint. The previous finding that the written Severance Contract between Meyer and Fidelity Savings is void for lack of consideration should be vacated. Meyer's right to continued employment was always subject to termination for just cause. Meyer paid the consideration of continued satisfactory job performance in return for the benefits of the Severance Agreement. Even if the terms of the contract are deemed excessive under 12 C.F.R. § 563.39, the contract is invalid only to the extent of its excessiveness and not *in toto*.

Count III

Alleging tortious breach of the implied employment contract and the implied covenant of good faith and fair dealing, Count III was dismissed against defendants United States, FSLIC and Pattullo by this Court in its Order of January 23, 1985. Under U.S.C. § 2679(a), the Federal Tort Claims Act ("FTCA") is the exclusive remedy for torts committed by federal agencies. Nor-

mally, the government is immune from suit, but the FTCA grants federal jurisdiction where the government expressly waives its sovereign immunity and consents to suit. 28 U.S.C. § 2680 lists exceptions to the government's waiver of immunity. Under the facts of this case, two of these exceptions apply, and plaintiff is thereby precluded from suing the government for its potential torts. Section 2680(a) excludes suits based on "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

This Court finds that the acts of Pattullo and the FSLIC were of the nature and quality that Congress intended to shield from tort liability under the test of *United States v. S. A. Empresa de Viacao Aerea Rio Grandeme,* 104 S. Ct. 2755, 2765 (1984), in which the nature of the conduct, rather than the status of the actor, governs whether the discretionary function exception applies. The second exception is found in 28 U.S.C. § 2680(h), which expressly excludes from the FTCA's limited waiver of immunity, claims "arising out of . . . . interference with contract rights." Count III clearly alleges breach of the implied employment contract and the related tort of breach of the implied covenant of good faith and fair dealing. Plaintiff's claim under Count III is specifically excluded under both 28 U.S.C. 2860 subsections (a) and (h). Plaintiff in his supplemental memorandum, does not offer any argument that the exclusionary subsections (a) and (h) do not apply in this case. Therefore, this Court's ruling of January 23, 1985, should not be disturbed to the extent that Count III was dismissed against the United States, the FSLIC and Pattullo.

CONCLUSION

In accordance with the foregoing, IT IS HEREBY ORDERED that;

(1) Count I is reinstated in its entirety against defendants FSLIC and Pattullo, and

(2) Count III remains dismissed against defendants United States, the FSLIC and Pattullo.

IT IS SO ORDERED.

Dated: Dec 5, 1988

/s/ J. P. Vukasin, Jr.
J. P. VUKASIN, JR., Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE
NORTHERN DISTRICT OF CALIFORNIA

Case No. C 83-2204 JPV

JOHN H. MEYER, PLAINTIFF

vs.

FIDELITY SAVINGS AND LOAN ASSOCIATION, ET AL., DEFENDANT(S)

JOINT STIPULATED STATEMENT OF UNDISPUTED FACTS

[Filed Sep. 11, 1989]

Pursuant to this Court's request at the pre-trial conference, July 28, 1989, plaintiff, JOHN H. MEYER, and defendants, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION and ROBERT L. PATTULLO, have stipulated that the following facts be deemed established for the purposes of the trial in this matter:

1. The plaintiff, JOHN H. MEYER, worked at FIDELITY SAVINGS for sixteen years from 1966 through a portion of 1982. At the time he was terminated by the FSLIC, MR. JOHN MEYER was an Executive Vice President in charge of branch operations.

2. As Executive Vice President in charge of branch operations, JOHN MEYER was responsible for negotiating leases for savings and loan branches, certain personnel matters within the branches, and general administrative management of the branches. He also had other duties

specifically relating to the branch operations. JOHN MEYER did not at the time of his firing, nor prior to that time, have responsibility for FIDELITY's loan policies.

3. FSLIC is a corporate body and an agency and instrumentality of the United States organized and existing under 12 U.S.C. §§ 1725 *et. seq.* Pursuant to 12 U.S.C. § 1725(a), FSLIC operates under the direction of the Federal Home Loan Bank ("FHLBB") and has its principal office in the District of Columbia. At all times prior to plaintiff JOHN H. MEYER'S termination, FSLIC insured the deposits of FIDELITY SAVINGS.

4. In 1979 FIDELITY SAVINGS began experiencing severe financial difficulties as a result of prior speculative loan commitment practices. Gambling that interest rates would fall, FIDELITY SAVINGS had sold large amounts of short-term paper in order to obtain the funds to make long-term mortgage loans at the current market rates. When interest rates rose sharply, FIDELITY SAVINGS suffered substantial operating losses and a decrease in net worth because the earnings on its low yielding portfolio were less than the increasing cost of its short-term borrowing.

5. FIDELITY SAVINGS' net worth had eroded from Ninety-One Million Six Hundred Thousand and 00/100 ($91,600.00) Dollars as of January 1981 to Nineteen Million Six Hundred Thousand and 00/100 ($19,600,00.00) Dollars as of March 31, 1982. As of March 31, 1982 the association had averaged monthly operating losses of Five Million and 00/100 ($5,000,000.00) Dollars and it was projected that the association would exhaust its entire net worth on or before July 1982. To meet its financial obligations, FIDELITY borrowed in excess of $1.3 billion from the Federal Home Loan Bank of San Francisco by March 1982.

6. FIDELITY SAVINGS had booked net operating losses on One Million Four Hundred Thousand and

00/100 ($1,400,000.00) Dollars for the year ending in December 31, 1980, Fifty Seven Million and 00/100 ($57,000,000.00) Dollars for the year ending December 31, 1981 and Fifteen Million and 00/100 ($15,-000,000.00) Dollars for the three months ending March 31, 1982. During the week of April 5, 1982, FIDELITY SAVINGS depositors withdrew nearly Seventy Million and 00/100 ($70,000,000.00) Dollars in deposits.

7. On April 13, 1982, due to FIDELITY SAVINGS' precarious financial position, the Savings and Loan Commissioner of the State of California appointed FSLIC as state receiver.

8. Plaintiff JOHN MEYER entered into an Employment Severance Contract on February 24, 1982.

9. At the close of business on April 13, 1982, the California Savings and Loan commissioner seized FIDELITY SAVINGS' assets, and appointed the FSLIC as state receiver. On that same date, the Federal Home Loan Bank Board appointed the FSLIC as federal receiver of FIDELITY SAVINGS replacing the state receivership by operation of federal law. MR. ROBERT PATTULLO was appointed as the FSLIC's special representative to handle the receivership of FIDELITY SAVINGS.

10. On April 13, 1982, JOHN MEYER, ADOLPH C. MEYER, KAREN MANNING and JOHN SERTICH were expressly terminated by the receiver acting through ROBERT L. PATTULLO. JOHN MEYER, along with others, was given a letter signed by ROBERT L. PATTULLO indicating that he was terminated.

11. After appointing the FSLIC as Receiver of FIDELITY SAVINGS the Federal Home Loan Bank Board created FIDELITY FEDERAL SAVINGS AND LOAN OF SAN FRANCISCO. Most of the assets and liabilities of FIDELITY SAVINGS were transferred to this new FIDELITY SAVINGS AND LOAN OF SAN FRANCISCO. FIDELITY FEDERAL was thereafter sold to CITICORP.

12. The receiver did not transfer to CITICORP any liabilities of FIDELITY SAVINGS as to JOHN MEYER, including any claim for wrongful termination or breach of an alleged severance pay contract to the extent such liabilities exist.

13. Prior to his termination, JOHN MEYER was not given an opportunity to either hear the reasons for his termination, or indicate to the FSLIC any reason why he should not be terminated. MEYER was not notified of any right to object to his termination by the FSLIC.

14. After his termination, the FSLIC did not give JOHN MEYER an opportunity to appeal the decision to terminate him, nor was he given an opportunity to present evidence as to why the decision should be changed.

15. JOHN MEYER did not apply for employment at FIDELITY SAVINGS' successor corporation. Further, JOHN MEYER was not hired by the successor corporation.

16. By virtue of the various transactions occurring after the seizure, the FSLIC assumed and undertook to pay and discharge valid liabilities, if, any arising out of JOHN MEYER's employment with or termination from FIDELITY.

Dated: September 9, 1989

COOLEY GODWARD CASTRO
HUDDLESTON & TATUM
DANIEL JOHNSON, JR.

By /s/ Daniel Johnson, Jr.
DANIEL JOHNSON, JR.
Attorneys for Defendant
Federal Savings and Loan
Insurance Corporation

Dated September 11, 1989

OWEN, WICKERSHAM & ERICKSON, P.C.
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By /s/ Robert J. Yorio
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Attorneys for Defendant
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Dated: September 7, 1989

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GENNARO A. FILICE III
CATHERINE DOUAT-MURRAY

By /s/ Gennaro A. Filice III
GENNARO A. FILICE III
Attorneys for John H. Meyer

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-83-2204 JPV (FW)

JOHN H. MEYER, PLAINTIFF

v.

FIDELITY SAVINGS AND LOAN ASSOCIATION, ET AL.,
DEFENDANTS

SPECIAL VERDICT

[Filed Sep. 19, 1989]

1. Did John Meyer have a legitimate claim of entitlement to employment or a reasonable expectation of continued employment arising out of an implied contract with Fidelity?

YES √ NO ——

If your answer to this question is "Yes", proceed to answer Question 2. If your answer is "No", sign and return this Verdict.

2. Was John Meyer discharged from his employment by the FSLIC and/or Robert L. Pattullo?

YES √ NO ——

If your answer to this question is "Yes", proceed to answer Question 3. If your answer to Question 2 is "No", sign and return this Verdict.

3. Did the FSLIC and/or Robert L. Pattullo fail to provide John Meyer a hearing, the reasons for his dis-

charge, and an opoprtunity to contest the reasons for his discharge before his termination?

YES √ NO ——

4. Do you find that defendant Robert Pattullo was acting within the scope of his employment at the time he terminated plaintiff?

YES √ NO ——

If your answer is "Yes", go to Question 5. If your answer to this question is "No", sign and return this Verdict.

5. Was John Meyer damaged as a result of the discharge from his employment?

YES √ NO ——

If your answer to this question is "Yes", proceed to answer Question 6. If your answer is "No", sign and return this Verdict.

6. What is the total amount of damages suffered by John Meyer as a result of his discharge from employment?

$130,000.00

If you award damages go to Question 7.

7. At the time Robert Pattullo terminated plaintiff, was he immune from any liability under the doctrine of qualified immunity?

YES √ NO ——

Dated: September 19, 1989

/s/ Marie V. Machado
Foreperson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-83-2204 JPV (FW)

JOHN H. MEYER, PLAINTIFF

v.

FIDELITY SAVINGS AND LOAN ASSOCIATION, ET AL., DEFENDANTS

JUDGMENT ON JURY VERDICT

[Filed Sep. 20, 1989]

The jury by a special verdict having found that plaintiff, John H. Meyer is entitled to damages in the sum of $130,000 as a result of his discharge from employment by the defendants, Federal Savings and Loan Insurance Corporation and Robert L. Pattullo and having further found that defendant Robert L. Pattullo is immune from liability under the doctrine of qualified immunity.

IT IS HEREBY ORDERED that judgment in the sum of $130,000 be entered in favor of the plaintiff, John H. Meyer against the defendant, Federal Savings and Loan Insurance Corporation only and that judgment be entered in favor of the defendant, Robert L. Pattullo and against the plaintiff, John H. Meyer.

IT IS SO ORDERED.

Dated: September 20, 1989

/s/ Frederick J. Woelflen
FREDERICK J. WOELFLEN
Chief United States Magistrate

SUPREME COURT OF THE UNITED STATES

No. 92-741

FEDERAL DEPOSIT INSURANCE CORPORATION,
PETITIONER

v.

JOHN H. MEYER, ET AL.

ORDER ALLOWING CERTIORARI

Filed March 22, 1993

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

March 22, 1993

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 67009

No. 92-741

In the Supreme Court of the United States

OCTOBER TERM, 1992

FEDERAL DEPOSIT INSURANCE CORPORATION, PETITIONER

v.

JOHN H. MEYER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION

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QUESTIONS PRESENTED

1. Whether the Federal Savings and Loan Insurance Corporation (FSLIC) may be held liable for damages arising out of an alleged violation of the Due Process Clause pursuant to a right of action implied under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971).

2. Whether FSLIC, acting as receiver for a failed savings and loan institution, violated the Due Process Clause by dismissing an officer of the institution without affording any opportunity for a hearing.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Robert L. Pattullo was a defendant in the district court and an appellee in the court of appeals.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-741

FEDERAL DEPOSIT INSURANCE CORPORATION, PETITIONER

v.

JOHN H. MEYER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 944 F.2d 562. The opinions of the district court granting defendants' motion to dismiss in part (J.A. 47-62) and reinstating defendants FSLIC and Pattullo under Count 1 of the Complaint (J.A. 63-71) are unreported. The ruling of the magistrate denying defendants' motion for summary judgment in part is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1991. A petition for rehearing was denied on June 29, 1992. Pet. App. 35a-36a. The petition for a writ of certiorari was filed on October 27, 1992, and was granted on March 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides: "nor shall any person * * * be deprived of life, liberty, or property, without due process of law." The pertinent statutory provisions are reprinted in an appendix to this brief.

STATEMENT

1. Congress created the Federal Savings and Loan Insurance Corporation (FSLIC) in 1934 to insure the accounts of all federal savings and loan associations and qualifying state-chartered associations. See National Housing Act, ch. 847, § 402(a), 48 Stat. 1256, codified as amended, 12 U.S.C. 1725(a) (1988) (repealed 1989). In addition, Congress provided that FSLIC would be appointed the conservator or receiver of any federally chartered thrift institution in default on its obligations, 12 U.S.C. 1729(b)(1) (1988), and would be authorized to accept appointment as conservator or receiver for defaulting state-chartered, federally insured thrifts. 12 U.S.C. 1729(c)(1)(A) (1988). When acting as receiver or conservator, FSLIC was authorized to (1) "take over the assets of and operate" the thrift, (2) "take such action as may be necessary to put [the thrift] in a sound solvent condition"; (3) "merge [the thrift] with another insured institution," (4) "organize a new Federal association to take over [the thrift's] assets," (5) "proceed to liquidate [the thrift's] assets in an orderly manner," or (6) "make such other disposition of the matter as it deems appropriate," whichever it deemed "to be in the best interest of the association, its savers, and the [FSLIC]." 12 U.S.C. 1729(b)(1)(A) (1988). See generally *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 569 (1989).[1]

[1] With the passage of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, FSLIC was abolished. The Federal Deposit Insurance

2. In 1982, respondent John H. Meyer was the Executive Vice President for Branch Operations of Fidelity Savings and Loan Association (Fidelity), a California-chartered thrift institution whose accounts were insured by FSLIC. Respondent had been employed by Fidelity in various capacities for 16 years. J.A. 72.

In 1979 Fidelity began experiencing severe financial difficulties. J.A. 73. Substantial operating losses had eroded the thrift's net worth from $91,600,000 (as of January 1981) to $19,600,000 (as of March 31, 1982). J.A. 73. By March 1982, Fidelity had borrowed more than $1.3 billion from the Federal Home Loan Bank of San Francisco. J.A. 73. The thrift was losing an average of $5 million a month, at which rate it would exhaust its entire net worth by July 1982. J.A. 73. As a final sign of Fidelity's distress, depositors withdrew more than $70 million from the association during the week of April 5, 1982. J.A. 74.[2] As a result of Fidelity's deteriorating condition, on April 13, 1982,[3] the California Savings and Loan Commissioner seized Fidelity and appointed FSLIC as receiver under state law. J.A. 74. On the same day, the Federal Home Loan Bank Board appointed FSLIC as Fidelity's receiver under federal law. J.A. 74.[4]

Corporation (FDIC) and the Resolution Trust Corporation (RTC) are generally empowered to act as receivers and conservators for federally insured thrift institutions. The authority of FDIC and RTC to act as receivers and conservators is similar to, but generally broader than, the authority granted to FSLIC. See 12 U.S.C. 1821(d), 1821(e) (Supp. III 1991) (FDIC); 12 U.S.C. 1441a(b)(4)(A) (Supp. III 1991) (RTC).

[2] On February 24, 1982, a number of Fidelity employees, including respondent, executed severance agreements with Fidelity purporting to entitle them to a year's pay "in the event that [Fidelity] is subjected to a regulatory merger or take over." J.A. 34.

[3] The court of appeals erred in stating (Pet. App. 2a & n.1) that Fidelity was placed in receivership in 1983. See J.A. 25, 74.

[4] See generally *Fidelity Sav. & Loan Ass'n* v. *Federal Home Loan Bank Bd.*, 689 F.2d 803, 805-807 (9th Cir. 1982) (rejecting chal-

FSLIC had a longstanding policy of terminating the employment of senior managers of thrifts for which FSLIC had been appointed receiver. C.A. Supp. Excerpts of Record, 65, 69. See note 30, *infra*. Pursuant to that policy, FSLIC discharged respondent along with his brother (Fidelity's president) and Fidelity's two other Executive Vice Presidents. J.A. 74. Respondent was informed by hand-delivered letter that he was being discharged (J.A. 74), but he was not given an opportunity to contest that decision. J.A. 75.[5]

3. Relying on this Court's decision in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), respondent filed an action for damages against various defendants, including FSLIC and its Special Representative, Robert L. Pattullo, who had acted on FSLIC's behalf. Respondent alleged that his discharge without a hearing violated his Fifth Amendment right not to be deprived of property without due process of law. J.A. 28-29. Specifically, he alleged that under California law he had a property right to continued employment with Fidelity absent good cause for dismissal, and that FSLIC did not have sufficient grounds to terminate his employment. J.A. 23. In addition, respondent claimed that FSLIC, Pattullo, and the United States were liable for damages in tort for breach of the implied covenant of good faith and fair dealing. J.A. 29-31.

lenge to FSLIC's appointment as Fidelity's federal receiver), cert. denied, 461 U.S. 914 (1983). See also *Fidelity Financial Corp.* v. *Federal Home Loan Bank*, 792 F.2d 1432, 1434 (9th Cir. 1986) (upholding Home Loan Bank's refusal to extend Fidelity further credit), cert. denied, 479 U.S. 1064 (1987); *FSLIC* v. *Angell, Holmes & Lea*, 838 F.2d 395, 396 (9th Cir.) (affirming FSLIC's right as receiver to terminate employment of Fidelity's lawyers), cert. denied, 488 U.S. 848 (1988).

[5] Most of Fidelity's assets and liabilities were sold by FSLIC as receiver the same day to Fidelity Federal Savings and Loan Association of San Francisco (Fidelity Federal), a newly chartered federal thrift, which was ultimately sold to Citicorp. J.A. 74. Fidelity Federal and its ultimate purchaser, Citicorp, did not acquire any of Fidelity's liabilities to respondent. J.A. 75. Those liabilities were transferred to FSLIC in its corporate capacity and ultimately to the FSLIC Resolution Fund. See 12 U.S.C. 1821a (2)(A) (Supp. III 1991).

Prior to trial, the district court held that respondent's common law tort claims against the defendants were barred both by the discretionary function exception to the Federal Tort Claims Act (FTCA), 28 U.S.C. 2680(a), and by the FTCA's exception for claims "arising out of * * * interference with contract rights," 28 U.S.C. 2680(h). J.A. 59-61. The court, however, denied motions to dismiss the *Bivens* claims against FSLIC and Pattullo, and those claims were tried before a jury.

The jury returned a verdict against FSLIC in the amount of $130,000. J.A. 78. In a special verdict, the jury found that respondent had a "legitimate claim of entitlement to employment or a reasonable expectation of continued employment arising out of an implied contract with Fidelity" and FSLIC "fail[ed] to provide * * * [respondent] a hearing, the reasons for his discharge, and an opportunity to contest the reasons for his discharge before his termination." J.A. 77-78. The jury did not award damages against Pattullo, finding that he was protected from liability under principles of qualified immunity. J.A. 78.

4. The court of appeals affirmed. The court rejected arguments by FDIC, as successor to FSLIC,[6] that the court lacked authority to award tort damages against a federal agency under *Bivens*, and that FSLIC had not violated respondent's constitutional rights.

a. The court of appeals concluded that *Bivens* provides a damages remedy for constitutional violations committed by FSLIC because Congress provided that the agency could "sue and be sued." See 12 U.S.C. 1725 (c)(4) (1988) (empowering FSLIC to "sue and be

[6] Pursuant to Section 401(f)(2) of FIRREA, 103 Stat. 356, FDIC was substituted for FSLIC as defendant in this suit. See 12 U.S.C. 1437 note (Supp. III 1991).

sued, complain and defend, in any court of competent jurisdiction").[7] The court determined that FSLIC's sue-and-be-sued clause constituted a "general waiver" of the government's immunity from suits for damages, Pet. App. 5a, which entitled respondent to damages for due process violations.

The court acknowledged that a sue-and-be-sued clause cannot be construed as a waiver of sovereign immunity for all tort claims, because Section 2679(a) of the FTCA expressly limits the scope of such waivers. 28 U.S.C. 2679(a). Under that section, a sue-and-be-sued clause "shall not be construed to authorize suits against [a] federal agency on claims which are cognizable under section 1346(b) of this title." 28 U.S.C. 2679(a). Pet. App. 6a. The court of appeals nevertheless found that the FTCA's limitation on "sue and be sued" clause waivers was inapplicable here. The court reasoned that Section 1346(b) authorizes damages only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). Because a private person would not be liable for a constitutional violation, the court concluded that such a claim is not "cognizable" within the meaning of Section 2679(a). Pet. App. 7a, 11a.

b. The court also concluded that respondent's dismissal without a hearing violated due process. Pet. App. 21a-28a. The court found that California law provided respondent with a property interest in continued employment absent good cause for termination. Pet. App. 22a-23a. The court rejected FDIC's argument that any such property interest was negated by the statutory and regulatory scheme governing federal thrift receiverships, which permitted FSLIC to terminate indefinite employment contracts. The court stated that "[t]he fact that federal and, arguably, state law conferred wide discretion to receivers to repudiate 'burdensome' contracts does not, retrospectively, annul the state entitlement." Pet. App. 26a. Accordingly, the court held that FSLIC was not absolved of its constitutional duty to provide respondent with a hearing on the question whether he should have been terminated. Pet. App. 28a.[8]

[7] The charters of both FDIC and RTC include sue-and-be-sued clauses. See 12 U.S.C. 1819 Fourth (Supp. III 1991) (FDIC); 12 U.S.C. 1441a(b)(9)(E) (Supp. III 1991) (RTC).

SUMMARY OF ARGUMENT

I. In 1971, this Court held in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, that the Constitution vested federal courts with authority to recognize an implied cause of action for damages against federal officials who deliberately engaged in unconstitutional conduct. For the first 20 years after *Bivens* was decided, no appellate court held that the remedy recognized in *Bivens* could be expanded to provide a cause of action directly against a federal agency. In this case, however, the court of appeals concluded that any agency with authority to sue and be sued is subject to damages for constitutional violations under *Bivens*. The court reached that result even though the same claim, if pled under state law tort principles, would be barred by the FTCA. The decision should be reversed because the federal courts have no authority to recognize an implied damage remedy against a federal agency for two independent reasons. First, Congress did not waive the immunity of federal agencies, including sue-and-be-sued agencies, for suits for damages for constitutional tort claims. Second, the substantive law relied upon, the procedural guarantee of the Due Process Clause, cannot be read as "mandating" compensation against the

[8] Respondent filed a cross-appeal challenging the jury's determination that Special Representative Pattullo was immune from damages. The court of appeals upheld that aspect of the jury's verdict, finding that Pattullo had violated no clearly established law. Pet. App. 33a. This Court denied respondent's cross-petition for certiorari to review that ruling. *Meyer* v. *Pattullo*, 113 S. Ct. 1578 (1993).

federal government, *United States* v. *Testan,* 424 U.S. 392, 402 (1976), and the courts accordingly have no authority to imply a damages remedy under *Bivens* even as to agencies that have waived sovereign immunity.

A. The court of appeals conceded that this action would be barred by the FTCA, which generally governs tort actions against the federal government and its agencies. The court held, however, that when Congress provided that FSLIC could sue and be sued, it intended to waive sovereign immunity for constitutional tort claims. That result is inconsistent with the language and purposes of the FTCA and this Court's cases construing the scope of the waiver effected by sue-and-be-sued clauses.

Section 2679(a) of the FTCA, 28 U.S.C. 2679(a), provides that sue-and-be-sued clauses "shall not be construed" to "authorize" any "claims which are cognizable under [the jurisdictional provision of the FTCA]," and that the "remedies provided * * * shall be exclusive." There is only one reasonable interpretation of that language. All claims against federal agencies that sound in tort are "cognizable" under the FTCA regardless of whether the statute permits compensation for those claims. This Court has not construed the term "cognizable," used elsewhere in the FTCA, to refer solely to tort claims that can provide a basis for recovery, *Hubsch* v. *United States,* 338 U.S. 440 (1949). In analogous circumstances, the Court has held that the FTCA provides the exclusive remedy for claims sounding in tort even when recovery is barred by the terms of the statute. *United States* v. *Smith,* 111 S. Ct. 1180 (1991).

The interpretation adopted by the court of appeals undermines the uniformity that Section 2679(a) was intended to create. Under the court's analysis, a variety of tort claims that cannot be maintained against most federal agencies can nevertheless be brought against agencies with sue-and-be-sued clauses. Yet Congress enacted Section

2679(a) for the very purpose of making the FTCA the sole avenue for tort recovery against all federal agencies. See H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945) (the purpose of Section 2679(a) is to "place [the] torts of 'suable' agencies * * * upon precisely the same footing as torts of 'nonsuable' agencies"). That conclusion also follows from an examination of FSLIC's sue-and-be-sued clause itself, which was intended to subject FSLIC to liability like that of any private entity, and which therefore does not waive sovereign immunity for constitutional tort claims to which a private entity could not be subject.

B. Even if FSLIC's sue-and-be-sued clause could be construed to waive sovereign immunity for all claims sounding in tort, respondent's claim would still have to be dismissed because he has not cited to any source of law that mandates the payment of damages against a federal agency for a violation of procedural due process. A right of action for damages against a federal agency simply cannot be recognized in the absence of a clear textual mandate providing for payment of compensation. *United States* v. *Mitchell,* 463 U.S. 206, 218 (1983). No such mandate can be found in the procedural guarantees of the Due Process Clause. *United States* v. *Hopkins,* 427 U.S. 123, 130 (1976).

Nor does *Bivens* provide any basis for implying a damages remedy against a federal agency. In *Bivens* itself, the Court based its conclusion that there were no special factors counselling against recognition of a judicially created remedy in part on the fact that the suit would not result in a money judgment directly against the government. Here, there is no doubt that the suit would permit a judgment directly against a federal entity. Creation of such a right would contravene congressional policy by exposing federal agencies to tort suits for the exercise of discretionary functions and would interfere with the remedial schemes of both the FTCA and the federal banking receivership statutes.

II. The court of appeals also erred in concluding that respondent stated a due process claim by alleging that the federal receiver deprived him of a state-created property interest without a hearing when it discharged him from employment. Respondent had no such property right, and even if he did, procedural due process was satisfied by the availability of postdeprivation remedies that he chose not to pursue.

A. Respondent never had any legitimate expectation that his state-created right to continued employment absent good cause would survive the appointment of a federal receiver. Under federal law, a banking receiver has complete discretion to select employees and to repudiate contracts. The States have no power to limit the authority of a federal banking receiver. Accordingly, even if state law afforded respondent an implied contractual right to continued employment as long as his employer continued its ordinary business operations, state law could not give him a right not to be terminated by a federal receiver. Respondent's contract was qualified, from its inception, by FSLIC's right to terminate his employment at will.

B. Even if respondent had a property interest in continued employment, there was no procedural due process violation here. In light of FSLIC's mandate to act with great speed in taking over a failing financial institution, a predeprivation hearing would have been impracticable. And respondent had available two postdeprivation remedies—submission of a claim to the federal receiver and suit on the violation of his alleged contractual right. In light of the fact that reinstatement was not possible because respondent's employer was closed and its business taken over by a newly chartered institution at the same time that the receiver was appointed, those remedies are more than adequate to provide all the process that was due for respondent's monetary claims.

ARGUMENT

I. *BIVENS* DOES NOT CREATE AN IMPLIED RIGHT OF ACTION AGAINST FEDERAL AGENCIES FOR VIOLATIONS OF PROCEDURAL DUE PROCESS

Even if FSLIC violated the Due Process Clause by terminating respondent's employment without adherence to adequate procedures, the federal courts have no authority to award damages for that violation. As this Court explained in *United States* v. *Mitchell*, 463 U.S. 206, 218 (1983), a claimant against a federal agency may not obtain an award of damages for a violation of law unless two "analytically distinct" conditions are satisfied. First, the claimant must demonstrate that the United States has waived sovereign immunity for the type of damages claim asserted. 463 U.S at 218. Second, even where the United States has consented to suit, "a court must inquire whether the source of substantive law" that allegedly has been violated "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *Ibid.* See also *United States* v. *Testan*, 424 U.S. 392, 400 (1976). Neither condition was satisfied in this case.

A. Congress Did Not Waive FSLIC's Sovereign Immunity For Tort Claims Based Upon Violations of The Constitution

The federal government "is immune from suit save as it consents to be sued." *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981) (quoting *United States* v. *Testan*, 424 U.S. at 399); accord *United States Dep't of Energy* v. *Ohio*, 112 S. Ct. 1627, 1633 (1992); *United States* v. *Sherwood*, 312 U.S. 584, 586-587 (1941). The court of appeals recognized that Congress has not waived the immunity of the United States as to "torts for which state law would not impose liability on private persons, such as constitutional torts." Pet. App. 10a; 28 U.S.C. 1346(b)

(waiving immunity "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred"). There is accordingly no dispute that the claim asserted in this case could not have been brought directly against the United States.[9]

The court of appeals nevertheless determined that respondent's claim was properly brought against FSLIC. The court concluded that, when Congress provided that FSLIC could sue and be sued, it intended to waive the agency's immunity for constitutional torts.

Initially, the court of appeals erred in interpreting FSLIC's sue-and-be-sued clause. Congress vests federal agencies and instrumentalities with the power to sue and be sued in order to render them "not less amenable to judicial process than a private enterprise under like circumstances would be." *FHA* v. *Burr,* 309 U.S. 242, 245 (1940). See also *Loeffler* v. *Frank,* 486 U.S. 549, 557 (1988) (permitting interest awards against Postal Service under sue-and-be-sued clause "to the extent that interest is recoverable against a private party as a normal incident of suit"). A sue-and-be-sued clause accordingly imposes liability on a federal entity "the same as that of any other business." *Franchise Tax Board* v. *United States Postal Service,* 467 U.S. 512, 520 (1984). Since the Constitution generally does not restrict the conduct of private entities, they are not subject to damages liability for constitutional violations. Accordingly, Congress did not in-

[9] Other courts have uniformly dismissed constitutional tort claims brought against the United States based upon the limited waiver of the FTCA. See, *e.g., McCollum* v. *Bolger,* 794 F.2d 602, 608 (11th Cir. 1986), cert. denied, 479 U.S. 1034 (1987); *Boda* v. *United States,* 698 F.2d 1174, 1176 (11th Cir. 1983); *Birnbaum* v. *United States,* 588 F.2d 319, 327-328 (2d Cir. 1978); cf. *Carlson* v. *Green,* 446 U.S. 14, 23 (1980).

tend sue-and-be-sued clauses to subject federal entities to damages liability for violations of the Constitution.

Even if FSLIC's sue-and-be-sued clause, taken in isolation, could be read to waive sovereign immunity to constitutional torts, however, the FTCA makes clear that such a reading would be improper.

1. The FTCA contains an express limitation on the scope of FSLIC's sue-and-be-sued clause that requires dismissal of respondent's claim. Section 2679(a) of the FTCA provides that

> [t]he authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

28 U.S.C. 2679(a). Section 1346(b), to which Section 2679(a) refers, is the "principal provision" of the FTCA. *Smith* v. *United States,* 113 S. Ct. 1178, 1181 (1993). It provides the basic waiver of sovereign immunity, subject to the conditions set forth in the statute.

The court of appeals acknowledged that Section 2679(a) generally renders the FTCA an exclusive remedy, even as to claims for which the FTCA does not permit recovery. Pet. App. 9a. But the court held that Section 2679(a) had that effect only for certain categories of tort claims. According to the court of appeals, tort claims that are "explicitly" excluded from the FTCA, such as the "[c]laims labeled 'exceptions' by 28 U.S.C. § 2680" are "cognizable" within the meaning of Section 2679(a) and hence must be brought under the FTCA, if at all. Pet. App. 8a-9a. The court held that tort claims like respondent's are "implicitly" excluded from the FTCA, because they are excluded by Section 1346(b), the basic waiver of sovereign immunity. According to the court, such claims are not "cognizable" within the meaning of Section 2679(a) and may be brought against

sue-and-be-sued agencies without regard to the substantive and procedural requirements of the FTCA. Pet. App. 8a, 10a-11a.[10]

The court's interpretation of the FTCA is not supported by the language Congress used, and it would eviscerate the uniform, exclusive scheme of tort remedies mandated by Section 2679(a). Respondent's claim is barred because all claims sounding in tort are "cognizable" under the FTCA, the constitutional claim respondent asserted sounds in tort, and respondent's claim thus may be brought only if it is permitted by the FTCA.

2. The court of appeals' holding that "expressly" excluded torts are "cognizable" under the FTCA while "implicitly" excluded torts are not is inconsistent with Congress's own use of the term "cognizable" elsewhere in the FTCA.

In terms identical to those used in Section 2679(a), 28 U.S.C. 2677 provides that "[t]he Attorney General * * * may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title." That language gives the Attorney General the power to settle any tort claim against the United States, even if there is a strong argument that there could be no FTCA recovery because the claim is, in the court of appeals' terms, "implicitly" excluded.

In *Hubsch* v. *United States*, 174 F.2d 7 (5th Cir. 1949), both the district court and the court of appeals held that a tort claim was barred under the FTCA because the employee who committed the tort had not been acting within the scope of his employment. Because the "scope of employment" requirement is found in Section 1346(b), the case would presumably be found to be "implicitly" excluded from the FTCA—and thus not "cognizable" under Section 1346(b) or Section 2677—under

[10] The court did not explain whether claims that are excluded on other grounds—for instance, because the claimant failed to submit a timely administrative claim, see 28 U.S.C. 2675(a)—would fall into the "explicit" or "implicit" category.

the rule applied by the Ninth Circuit in this case. Nonetheless, this Court held, in a *per curiam* opinion, that Section 2677 provided authority for the Attorney General to settle the claim. *Hubsch* v. *United States*, 338 U.S. 440 (1949). That holding establishes that, even though recovery on the claim was almost certainly precluded by Section 1346(b), the claim was still "cognizable" under that provision.

The same conclusion follows from actions Congress took in revising the FTCA's statute of limitations provision in 1948. That provision originally governed "[e]very claim against the United States cognizable under this title." 28 U.S.C. 942 (1946). In the course of a comprehensive revision of the Judicial Code, the provision was changed to apply—as it does today—to any "tort claim against the United States." 28 U.S.C. 2401(b). The reviser stated that the modification was intended to "simplif[y] and restate[]" the limitations provision "without change of substance." 28 U.S.C. 2401(b), Revision Note.[11] Congress accepted that explanation and the revised version of the statute, thus indicating that it viewed all tort claims as "cognizable" under the FTCA, regardless of whether they may be excluded by one or another requirement of the statute.

3. This Court's decision in *United States* v. *Smith*, 111 S. Ct. 1180 (1991), provides further support for the conclusion that all claims sounding in tort are "cognizable" under the FTCA without regard to whether the Act permits recovery on the claim. In *Smith*, the Court held that even though the FTCA itself did not permit recovery on the plaintiff's claim, an FTCA exclusive remedy provision barred him from pursuing an alternative rem-

[11] Indeed, absent an express statement by the Revisers to the contrary, this Court has presumed that modifications made in the 1948 revision of the Judicial Code did not change prior law. *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 831 n.4 (1989); *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 227-228 (1957).

edy.[12] The numerous courts that have considered the issue under Section 2679(a), the provision at issue in this case, have all reached the same conclusion.[13]

The logic of *Smith* applies regardless of whether a tort claim is made noncompensable through the "implicit" exclusions of Section 1346(b) or through the "explicit" exclusions of Section 2680. The FTCA is a conditional waiver of the federal government's sovereign immunity. It incorporates numerous limitations on that waiver, set forth in a variety of different sections. See, *e.g.*, 28 U.S.C. 2680(a) (discretionary function exception); 28 U.S.C. 2675(a) (timely filing of an administrative claim); 28 U.S.C. 1346(b) (claim must be based on the liability of a private person under local law). There is no evidence that Congress attributed any significance to

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[12] *Smith* involved 28 U.S.C. 2679(b)(1), which provides that an FTCA action is "exclusive of any other civil action or proceeding for money damages * * * against the employee whose act or omission gave rise to the claim." In *Smith*, the plaintiff's malpractice claim under the FTCA was barred by 28 U.S.C. 2680(k), because it arose outside the United States. This Court held that Section 2679(b) "makes the FTCA the exclusive mode of recovery for the tort of a Government employee even when the FTCA itself precludes Government liability," and therefore barred a separate suit against the employee. 111 S. Ct. at 1185.

[13] See, *e.g.*, *Taylor* v. *Administrator of SBA*, 722 F.2d 105 (5th Cir. 1983); *Northridge Bank* v. *Community Eye Care Center, Inc.*, 655 F.2d 832, 834-835 (7th Cir. 1981); *FDIC* v. *Citizens Bank & Trust Co.*, 592 F.2d 364, 370-371 (7th Cir.), cert. denied, 444 U.S. 829 (1979); *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Inst.*, 566 F.2d 289, 296-299 (D.C. Cir. 1977), cert. denied, 438 U.S. 915 (1978); *Safeway Portland Employees Fed. Credit Union* v. *FDIC*, 506 F.2d 1213, 1215 (9th Cir. 1974); *Edelman* v. *Federal Housing Admin.*, 382 F.2d 594 (2d Cir. 1967); *Goddard* v. *District of Columbia Redevelopment Land Agency*, 287 F.2d 343, 345-346 & n.3 (D.C. Cir.), cert. denied, 366 U.S. 910 (1961); *Freeling* v. *FDIC*, 221 F. Supp. 955, 956 (W.D. Okla. 1962), aff'd, 326 F.2d 971 (10th Cir. 1963) (per curiam).

the statutory placement of those conditions for purposes of determining the types of claims that are "cognizable" under the FTCA. See S. Rep. No. 1400, 79th Cong., 2d Sess. 29 (1946) ("This title waives, with certain limitations governmental immunity to suit *in tort* and permits suit on *tort claims* to be brought against the United States.") (emphasis added).

4. The end result of the court of appeals' interpretation of Section 2679(a) is to subject sue-and-be-sued agencies to tort suits that cannot be brought against other federal agencies. Yet that is exactly what Section 2679(a) was enacted to prohibit.

Prior to the enactment of the FTCA, tort claims against federal agencies were compensable only through the enactment of private bills. See generally Holtzoff, *The Handling of Tort Claims Against the Federal Government*, 9 Law & Contemp. Prob. 311 (1942). When Congress enacted the FTCA in 1946, ch. 753, §§ 401 *et seq.*, 60 Stat. 842, it intended to displace that cumbersome legislative process with a uniform framework for judicial resolution of tort claims against the government.

By 1946, however, more than 40 federal instrumentalities had been created with sue-and-be-sued clauses in their organic statutes. See *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 390 (1939). Those clauses generally had been held to constitute consent to suit for tort claims. See, *e.g.*, *id.* at 395-396; *Sloan Shipyards Corp.* v. *United States Shipping Bd. Emergency Fleet Corp.*, 258 U.S. 549, 567-568 (1922). Accordingly, Congress confronted the prospect that the sue-and-be-sued clauses of some agencies would provide a back-door waiver of immunity from tort claims that would threaten the integrity of the carefully crafted administrative procedures and substantive limitations built into the FTCA. Its solution was Section 2679(a).

The language of Section 2679(a) leaves no doubt that tort claims against sue-and-be-sued agencies must be subject to the same uniform administrative machinery and

substantive limitations as are suits against any other agency. As the House Committee Report explained, "[t]his will place torts of 'suable' agencies of the United States upon precisely the same footing as torts of 'nonsuable' agencies." H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945). For both types of agencies, "the suits would be against the United States, subject to the limitations and safeguards of the bill; and in both cases the exceptions of the bill would apply either by way of preventing recovery at all or by way of leaving recovery to some other act." *Ibid.* Congress "intended that neither corporate status nor 'sue-and-be-sued' clauses shall, alone, be the basis for suits for money recovery sounding in tort." *Ibid.*[14] *See* generally *Loeffler* v. *Frank*, 486 U.S. 549, 561-562 (1988).

The court of appeals' holding that "implicitly" excluded claims are not cognizable under the FTCA entirely defeats Congress's expressed intent in enacting Section 2679(a) to "place torts of 'suable' agencies * * * upon precisely the same footing as torts of 'nonsuable' agencies." Because a plaintiff could sue a sue-and-be-sued agency—but not the United States itself or any other federal agency—on an "implicitly" excluded claim, the effect would be directly contrary to Congress's intent;

[14] The FTCA was ultimately enacted as Title IV of the Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812. The Senate Report on the bill contained exactly the same language explaining the exclusive remedy provision as did the House Report. See S. Rep. No. 1400, 79th Cong., 2d Sess. 33-34 (1946). An earlier report on a predecessor bill made a similar point. See S. Rep. No. 1196, 77th Cong., 2d Sess. 8 (1942), which explained that "there is no sound reason for distinguishing between employees of an executive department or independent establishment and those of a governmental corporation." See also *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on Judiciary*, 77th Cong., 2d Sess. 34 (1942) (testimony of Ass't Att'y Gen. Francis M. Shea) (the provision "terminate[s] the liability of Federal corporations which now are subject to be sued in their own name, in respect of tort claims generally cognizable under the act").

it would make the sue-and-be-sued clause "the basis for suits for money recovery sounding in tort."

Nor would the effect of the court of appeals' holding be limited to constitutional torts. As noted above, Section 1346(b) excludes several distinct types of tort claims, in addition to those for which a "private person * * * would [not] be liable to the claimant in accordance with the law of the place where the act or omission occurred." Strict liability claims, *i.e.*, those claims not caused by the "negligent or wrongful act or omission" of a federal employee—are excluded by Section 1346(b). See *Dalehite* v. *United States*, 346 U.S. 15, 44-45 (1953); *Laird* v. *Nelms*, 406 U.S. 797, 801 (1972). So are claims caused by a federal employee not "acting within the scope of his office or employment." See *Hatahley* v. *United States*, 351 U.S. 173, 180-181 (1956). Since all of those claims are excluded by Section 1346(b), the court of appeals would be likely to classify all as "implicitly" excluded claims and permit suit on any of them to be brought directly against sue-and-be-sued agencies.

Even the requirement that federal agencies be held liable only if private persons would be liable under state law would result in permitting garden-variety tort claims to be brought against sue-and-be-sued agencies free of the requirements of the FTCA. Numerous cases have found the private person/state law requirement was not satisfied because, for example, state law exempted private persons from liability[15] or the law of a State other than that in which the act occurred would have imposed liability.[16] Under the court of appeals' reasoning, all of those

[15] See, *e.g.*, *Proud* v. *United States*, 723 F.2d 705 (9th Cir.), cert. denied, 467 U.S. 1252 (1984); *DiMella* v. *Gray Lines of Boston, Inc.*, 836 F.2d 718, 720 (1st Cir. 1988); *Ewell* v. *United States*, 776 F.2d 246, 249-249 (10th Cir. 1985).

[16] See, *e.g.*, *Myrick* v. *United States*, 723 F.2d 1158 (4th Cir. 1983); *Brock* v. *United States*, 601 F.2d 976, 977 & n.2 (9th Cir. 1979).

cases could be brought against sue-and-be-sued agencies because they are only "implicitly" excluded from the FTCA. None of them, however, could be brought against the United States or nonsuable government agencies.

5. If the court of appeals had interpreted Section 2679(a) correctly, it could not have construed FSLIC's sue-and-be-sued clause to waive FSLIC's sovereign immunity from respondent's claim. That claim sounds in tort.

a. Although respondent's claim is grounded on the Constitution and framed in due process terms, even the court of appeals recognized that it "sound[s] in tort." Pet. App. 10a. Quoting a recent treatise, this Court has recently defined "tort" as a "civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages." *United States* v. *Burke,* 112 S. Ct. 1867, 1870-1871 (1992) (citation omitted). Although a number of other definitions of "tort" have been offered, all of them share two features: the violation of a non-consensual duty or obligation and a request for damages.[17] Respondent's claim falls squarely within that definition.[18]

[17] The Fourth Circuit has recently stated that "[a] cause of action for breach of a duty imposed by statute or case law, and not by contract, is a tort action." *J.C. Driskill, Inc.* v. *Abdnor,* 901 F.2d 383, 386 (4th Cir. 1990). Accord *FDIC* v. *Citizens Bank & Trust Co.,* 592 F.2d 364, 369 (7th Cir.), cert. denied, 444 U.S. 829 (1979). Among the definitions in *Black's Law Dictionary* 1489 (6th ed. 1990) are "[a] violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other which is involved in a given transaction" and "[a] legal wrong committed upon the person or property independent of contract." See also W. Prosser, *The Law of Torts* 2 (4th ed. 1971); 1 S. Speiser, C. Krause & A. Gans, *The American Law of Torts* § 1:1 (1983).

[18] In a footnote, the court of appeals questioned "whether all 'constitutional torts' are properly understood as torts," and noted that, under California law, contractual remedies are the sole source of relief for breaches of the implied covenant of good faith and

That conclusion is further supported by decisions involving *Bivens* actions against federal officers and actions brought against state officers pursuant to 42 U.S.C. 1983, which serves a function analogous to *Bivens* in the state context. For example, this Court has frequently recognized that 42 U.S.C. 1983 "creates a species of tort liability." *Memphis Community School District* v. *Stachura,* 477 U.S. 299, 305 (1986) (internal quotation marks omitted); see *Smith* v. *Wade,* 461 U.S. 30, 34 (1983); *Carey* v. *Piphus,* 435 U.S. 247, 253 (1978); *Imbler* v. *Pachtman,* 424 U.S. 409, 417 (1976). In addition, this Court has turned to state statutes of limitations applicable to torts—not to contracts—to provide appropriate limiations periods for constitutional claims brought under Section 1983, see *Wilson* v. *Garcia,* 471 U.S. 261, 276-277 (1985), and lower courts have applied the same reasoning to *Bivens* actions, see *e.g., Van Strum* v. *Lawn,* 940 F.2d 406, 409-410 (9th Cir. 1991); *Chin* v. *Bowen,* 833 F.2d 21, 22-23 (2d Cir. 1987). Similarly, in identifying immunities available to defendants in Section 1983 actions based, like *Bivens* actions, on violations of the Constitution, this Court has relied on the analogy between constitutional violations and common law torts. See, *e.g., Briscoe* v. *LaHue,* 460 U.S. 325, 330 (1983); *City of Newport* v. *Fact Concerts, Inc.,* 453 U.S. 247, 258 (1981) (referring to "the tort liability created by § 1983"); *Pier-*

fair dealing. Pet. App. 20a-21a n.17. Respondent's claim, however, is not that FSLIC entered into an agreement to provide him with a hearing before discharging him and then violated that agreement. Rather, it is that FSLIC deprived him of a property interest without due process of law. Indeed, before trial respondent's counsel highlighted the "important * * * distinction" between respondent's due process claims and a suit for breach of contract. As counsel explained: "this is not a situation where the employer has terminated an employee. Rather, it's a situation where the federal government has taken from a citizen a property right, namely, the right to continued employment absent just cause for dismissal. And that will affect the damages and will affect the case in a lot of ways." 1 Tr. 6-7.

son v. *Ray,* 386 U.S. 547, 553-557 (1967). And the Court has often described Constitution-based claims brought under *Bivens* and Section 1983 as "constitutional torts." [19]

b. Recent legislation also makes clear that claims based upon alleged constitutional violations sound in tort and are "cognizable"—but not compensable—under the FTCA. The Federal Employees Liability Reform and Tort Compensation Act of 1988 (Liability Reform Act), Pub. L. No. 100-694, §§ 5, 6, 102 Stat. 4564-4565, added a new 28 U.S.C. 2679(b) to the statute to parallel the exclusive remedy provision at issue in this case, 28 U.S.C. 2679(a). The new section provides that the "[t]he remedy against the United States provided by section[] 1346(b) * * * is exclusive of any other civil action or proceeding" against federal employees acting within the scope of their employment. 28 U.S.C. 2679(b)(1). But the new section also expressly provides that it "does not extend or apply to a civil action * * * which is brought for a violation of the Constitution of the United States." 28 U.S.C. 2679(b)(2)(A).

The new statute is based on the premise that—contrary to the court of appeals' holding in this case—Section 1346(b) provides a "remedy against the United States" for constitutional torts, even though no recovery is permitted. For if Congress believed that Section 1346(b) did not provide a "remedy against the United States" for constitutional torts, the new exclusive remedy provision would have had no application to such torts in any event, and Section 2679(b)(2) would have been entirely superfluous. The court of appeals appears to have acknowledged that reasoning, but concluded that Section 2679

[19] See, *e.g., Collins* v. *City of Harker Heights,* 112 S. Ct. 1061, 1066-1068 (1992); *Siegert* v. *Gilley,* 111 S. Ct. 1789, 1792 (1991); *Memphis Community School District* v. *Stachura,* 477 U.S. at 307; *Smith* v. *Wade,* 461 U.S. 30, 75 (1983) (Rehnquist, J., dissenting); *Polk County* v. *Dodson,* 454 U.S. 312, 326 (1981); *Monell* v. *Department of Social Services,* 436 U.S. 658, 663-664 n.7 (1978).

(b)(2) was simply a "reminder" or an "added guarantee." Pet. App. 19a. That conclusion ignores the rule that Congress is presumed not to have enacted superfluous provisions. See, *e.g., Mackey* v. *Lanier Collection Agency & Service, Inc.,* 486 U.S. 825, 837 (1988); *Colautti* v. *Franklin,* 439 U.S. 379, 392 (1979); *Jarecki* v. *G.D. Searle & Co.,* 367 U.S. 303, 307-308 (1961); *United States* v. *Menasche,* 348 U.S. 528, 538-539 (1955).

B. The Court Should Not Imply a Damages Remedy Against Federal Agencies For Denials of Procedural Due Process

Even if Congress waived FSLIC's immunity from all claims for damages, respondent still must demonstrate that the "substantive law" he relies upon—here the procedural guarantees of the Due Process Clause—"can be, interpreted as *requiring* compensation." *Mitchell,* 463 U.S. at 218 (emphasis added). Unlike the Just Compensation Clause of the Fifth Amendment, the Due Process Clause makes no reference to compensatory redress. The court of appeals therefore erred in holding that this Court's decision in *Bivens* authorized it to read the Due Process Clause as creating an implied right of action for damages against federal agencies.

1. A simliar construction of the rights conferred by the Due Process Clause was rejected in *United States* v. *Hopkins,* 427 U.S. 123 (1976) (per curiam). In *Hopkins,* a former federal employee asserted a claim under the Tucker Act, 28 U.S.C. 1491, for wrongful discharge. The Tucker Act includes a broad waiver of sovereign immunity for certain types of claims founded upon violations of "the Constitution" and other laws. 28 U.S.C. 1491. The claimant in *Hopkins* contended that her discharge claim was based upon "the Constitution" within the meaning of the Tucker Act because it violated due process. The Court observed that its decision in *United States* v. *Testan,* 424 U.S. 392, 402 (1976)—which em-

phasized that a waiver of sovereign immunity authorizes the award of money only if the substantive law allegedly violated "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained"—"foreclosed" a monetary claim for a violation of procedural due process rights. 427 U.S. at 130.

Hopkins indicates that the waiver of sovereign immunity under the Tucker Act for constitutional violations does not supply a right of action for damages under the Due Process Clause because that Clause cannot be read as "mandating" (*Testan,* 424 U.S. at 402) compensation. See also *Inupiat Community of the Arctic Slope* v. *United States,* 680 F.2d 122, 132 (Ct. Cl.), cert. denied, 459 U.S. 969 (1982); *Mack* v. *United States,* 635 F.2d 828, 832 (Ct. Cl. 1980), cert. denied, 451 U.S. 913 (1981); *Montoya* v. *United States,* 22 Cl. Ct. 568, 570 (1991). Similarly, even if FSLIC's sue-and-be-sued clause could be read to waive immunity for constitutional torts, it does not supply a right of action for damages, and neither does the Due Process Clause.

Although *Bivens* held that federal courts have the authority to impose damages on individual officials, 403 U.S. at 396-397, nothing in that decision, or in this Court's subsequent cases, suggests that the Due Process Clause can be read as "mandating" compensation against the federal government. The recognition of a right of action for damages against a federal agency under the Due Process Clause accordingly does not conform to the requirements established in *Hopkins,* 427 U.S. at 130, and *Testan,* 424 U.S. at 402. See also *OPM* v. *Richmond,* 496 U.S. 414, 432 (1990) (judicial recognition of equitable estoppel barred by the Appropriations Clause because "[f]unds may be paid out only on the basis of" some "express terms" that establish a "substantive right to compensation").

2. Even if the Due Process Clause were read to grant federal courts discretion to imply a right of action for

damages against a federal agency, this Court's decisions would not support the exercise of that authority here. In *Bivens,* this Court held that an individual who can demonstrate an injury as the consequence of a violation of his Fourth Amendment rights by a federal employee may bring a suit for money damages against that employee. By implying a private right of action directly from the Constitution in favor of an injured plaintiff, the Court permitted the action to be brought against the federal employee whose constitutional violation caused the injury, but not against the government itself. As the Court noted, there were no "special factors counselling hesitation" in implying a cause of action against the individual employee. 403 U.S. at 396. Several factors do counsel hesitation in the very different context presented here.

a. Unlike the remedy recognized in *Bivens,* the right of action created by the court of appeals in this case involves "a question of 'federal fiscal policy.'" 403 U.S. at 396. See also *United States* v. *Standard Oil Co.,* 332 U.S. 301, 314 (1947) ("Congress, not this Court or the other federal courts, is the custodian of the national purse" and "the primary and most often the exclusive arbiter of federal fiscal affairs").

Respondent has argued that the fiscal impact of this action would be no greater than the impact of a *Bivens* action against a federal employee in circumstances under which that employee could obtain indemnification from the federal government. Br. in Opp. 12. The fact that individual federal employees may be indemnified for *Bivens* awards against them, however, has no bearing on the question whether a *Bivens* action can be implied directly against a federal agency. The legal difficulty with *Bivens* actions directly against the federal government is not just that judgments against the government in such actions cost money, although that is a concern. Rather, it is that Congress, which is the only entity to which the Constitution grants authority to appropriate federal funds,

see *OPM* v. *Richmond*, 496 U.S. 414, 424-425 (1990), has never created a general cause of action for constitutional violations by federal agencies or authorized the expenditure of federal funds to satisfy judgments in a court-authorized action of that sort.[20] It is that fact—and not solely the fiscal impact of *Bivens* actions on the federal treasury—that renders implication of a *Bivens* action against a federal agency "plainly inconsistent with Congress' authority in this field." *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983).

The necessity for respecting Congress' exclusive authority over federal appropriations is illustrated by government indemnification programs. Unlike a judgment against a federal agency, federal payment of a damages award against a federal employee, although in many cases authorized, is always subject to certain requirements or conditions. See, *e.g.*, 28 C.F.R. 50.15(c) (authorizing Department of Justice to indemnify its employees only after determining that "such indemnification is in the interest of the United States"). In limiting the availability of indemnification, Congress or Executive Branch officials with delegated authority are exercising a constitutional prerogative. To imply a *Bivens* action with no such limitations—or with such limitations as this Court or the lower federal courts believed appropriate—would be to transfer that constitutional prerogative from the legislature, where it rests under Article I, § 9, Cl. 7 of the Constitution, to the judiciary.

b. A second factor counsels hesitation in the context of this case. Congress enacted the discretionary function exception to the FTCA to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984); see also *United States* v. *Gaubert*, 111 S. Ct. 1267, 1273 (1991). Indeed, because judicial review in tort suits of administrative (or legislative) policy choices would raise core separation of powers concerns, this Court has noted Congress's belief that "claims of the kind embraced by the * * * exception would have been exempted from the waiver of sovereign immunity by judicial construction" even if Congress had not included the exception in the FTCA. *Varig Airlines*, 467 U.S. at 810.

FSLIC's action in dismissing respondent is plainly the type of discretionary function that Congress sought to protect from judicial review in tort suits. Upon the failure of a bank or thrift, federal regulators and receivers seek to maintain the public's confidence in the savings and loan industry and to preserve the failed institution's assets for the benefit of accountholders. *Langley* v. *FDIC*, 484 U.S. 86, 91 (1987). As in *United States* v. *Gaubert*, decisions made by a federal receiver after the takeover of a failed thrift—including decisions about which employees to terminate and which contracts to repudiate—are based on "policy reasons of primary concern to the [federal officials]" and thus would fall within the discretionary function exception if challenged under the FTCA. 111 S. Ct. at 1278.[21] The court of appeals' decision to imply a *Bivens* remedy here impermissibly expands judicial re-

[20] The judgment fund created by 31 U.S.C. 1304 does not provide such authorization, since that fund does not create the "substantive right to compensation," *OPM* v. *Richmond*, 496 U.S. at 432, that respondent seeks in this lawsuit. See also *Republic National Bank* v. *United States*, 113 S. Ct. 554, 563 (1992).

[21] It is instructive to note that one of the acts complained of in the *Gaubert* litigation was a decision by federal regulators to require that the thrift's board of directors be replaced with federally approved personnel. The court of appeals in *Gaubert* found that decision to fall within the discretionary function exception, a ruling that Gaubert did not challenge. 111 S. Ct. at 1276. Similarly, the district court in this case found that respondent's action against the United States was barred by the discretionary function exception. See p. 5, *supra*.

view of administrative and legislative policy choices in the face of Congress's express prohibition of such review. See *United States* v. *Stanley*, 483 U.S. 669 (1987).

c. This Court has also found that the existence of an elaborate remedial mechanism fashioned by Congress is a special factor counseling against implication of a *Bivens* remedy, even if that scheme would not provide a complete remedy for the prospective *Bivens* plaintiff. That factor applies here as well.

In *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983), the Court recognized that federal employees had "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." Despite the fact that the plaintiff federal employee's Civil Service remedies "did not fully compensate him for the harm he suffered," the Court held that no *Bivens* remedy should be implied for his claim that he had been demoted for exercising his First Amendment rights. Similarly, in *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), this Court followed *Bush* in refusing to imply a *Bivens* remedy for an individual who claimed his social security disability benefits were improperly terminated, despite the fact that the existing remedial scheme would not provide him with complete relief. *Id.* at 424-429.

Similarly, respondent's claim arises at the intersection of several different remedial schemes. Initially, as we explained above, see pp. 13-23, *supra*, Congress has addressed the issue of tort claims against the government, and has embodied in the FTCA its own judgments about the circumstances under which such claims should be permitted. In addition, as we explain below, see pp. 40-44, *infra*, respondent could have brought his claim as a creditor of the receivership estate either through an administrative claims process, with subsequent adjudication in federal court, or directly in federal court. The existence of both the FTCA scheme and the receivership remedy strongly counsels against further modification of the sys-

tem of rights and remedies through implication of a *Bivens* action for respondent and other creditors of a banking receivership estate.

II. RESPONDENT'S DISMISSAL WITHOUT A HEARING DID NOT VIOLATE THE DUE PROCESS CLAUSE

Regardless of FSLIC's amenability to a constitutional damages suit, FSLIC did not violate the Due Process Clause when it dismissed respondent without a hearing. Respondent did not have a protected property interest in continued employment with Fidelity once Fidelity had been placed in federal receivership, and even if such an interest had existed, the opportunity for respondent to file a claim against FSLIC as receiver satisfied the Due Process Clause.

A. Respondent Had No Protected Property Interest In Continued Employment With Fidelity After It Was Taken Over By FSLIC

"Property interests, of course, are not created by the Constitution"; instead, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972); *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 538 (1985). In this case, there was neither a "rule" nor an "understanding" that could provide respondent with an expectation of continued employment absent good cause for dismissal once a federal receiver had taken over Fidelity. Therefore, the receiver's dismissal of respondent did not deprive respondent of any property interest, and he has failed to state a claim under the Due Process Clause.

1. The court of appeals held that, under California common law, respondent had obtained a right to continued employment absent good cause, in light of "a history of satisfactory employment" and "an understanding

of fair dealing." Pet. App. 26a; see also Pet. App. 22a-23a. The court stated that California courts have treated the violation of that right as a breach of contract, to be remedied by contract damages. Pet. App. 20a-21a n.17, 22a-23a n.18 (both quoting *Foley* v. *Interactive Data Corp.*, 765 P.2d 373, 401-402 (Cal. 1988)).

Although California law may have given respondent an enforceable contractual right to continued employment, federal law does not recognize a right to continued employment with a thrift placed in receivership. As noted above, at the time Fidelity failed, FSLIC as receiver was empowered by statute to (1) take over and operate the thrift, (2) liquidate it, (3) merge it with another institution, (4) "take such action as may be necessary to put it in a sound solvent condition," or (5) "make such other disposition of the matter as it deem[ed] appropriate." 12 U.S.C. 1729(b)(1)(A) (1988). Accordingly, the agency's regulations made clear that as receiver, it was to "do all things desirable or expedient at its discretion to carry on the business of [the failed] institution and to preserve and conserve the assets and property of every nature of such institution," including "[e]mploy[ing] on a salary or fee basis such personnel as in [its] judgment * * * is necessary or desirable to carry out its responsibilities and functions." 12 C.F.R. 569a.6(a)(1) and (4) (1982).[22] In addition, the regulations made clear that FSLIC could exercise the "power to * * * [r]eject or repudiate any lease or contract which it considers burdensome." 12 C.F.R. 569a.6(c)(3) (1982).[23] The "broad statutory

[22] The regulations were promulgated by the Federal Home Loan Bank Board pursuant to 12 U.S.C. 1464(d)(6)(C) (1988). See *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 571 (1989).

[23] Although prior to FIRREA, no parallel regulation expressly gave FDIC the power to repudiate executory contracts, courts recognized that as receiver it necessarily had that authority. See, *e.g.*, *FDIC* v. *Grella*, 553 F.2d 258, 262-263 (2d Cir. 1977); *Argonaut*

mandate," *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 580 (1989); see *id.* at 568-572, granted federal receivers thus necessarily included a right to terminate bank management at will—a right that FSLIC and FDIC have regularly exercised in the public interest.[24] See *Gaubert*, 111 S. Ct. at 1279. And Congress underscored FSLIC's discretion in exercising its powers as receiver by generally prohibiting courts from "restrain[ing] or affect[ing] the exercise of powers or functions of a

Sav. & Loan Ass'n v. *FDIC*, 392 F.2d 195, 197 (9th Cir.), cert. denied, 393 U.S. 839 (1968). When it enacted FIRREA, Congress codified and enlarged the authority of FDIC and RTC to repudiate contracts. See 12 U.S.C. 1821(e)(1) (Supp. III 1991) (FDIC); 12 U.S.C. 1441a(b)(4)(A) (Supp. III 1991) (RTC). Those provisions of FIRREA "incorporate[] rights and principles established at common law or in bankruptcy." S. Rep. No. 19, 101st Cong., 1st Sess. 314 (1989). FIRREA also "follows common law principles in limiting to compensatory relief the damages that a party may claim on a repudiated contract." *Ibid.*

[24] FSLIC's authority to repudiate executory contracts, including employment contracts, mirrored the similar power that receivers have under the common law. In general, a receiver is "not bound to adopt the contracts, accept the leases, or otherwise step into the shoes of his assignor, if, in his opinion, it would be unprofitable or undesirable to do so." *United States Trust Co.* v. *Wabash Western Ry.*, 150 U.S. 287, 288-289 (1893). That principle has long been applied to employment contracts. See, *e.g.*, *Erie Malleable Co.* v. *Standard Parts Co.*, 299 F. 82, 85-86 (6th Cir. 1924); *Greenblatt* v. *Ottley*, 430 N.Y.S.2d 958, 963 (Sup. Ct. 1980); *Riker* v. *Browne*, 204 N.Y.S.2d 60, 62 (Sup. Ct. 1960); *Rosenbaum* v. *United States Credit-System Co.*, 40 A. 591, 593 (N.J. 1898); *Birmingham Trust & Sav. Co.* v. *Atlanta B. & A. Ry.*, 271 F. 731, 738 (N.D. Ga. 1921). Some courts have held that upon appointment of a receiver, employment contracts terminate as a matter of law. See *Wade* v. *Mutual Bldg. & Loan Ass'n*, 145 S.E. 18, 19 (N.C. 1928); *People* v. *Globe Mut. Life Ins. Co.*, 91 N.Y. 174, 179-180 (1883); *Ely* v. *Van Kannel Revolving Door Co.*, 184 F. 459, 462 (C.C.E.D.N.Y. 1911); *Lenoir* v. *Linville Improvement Co.*, 36 S.E. 185, 188 (N.C. 1900). In a somewhat analogous situation, the Bankruptcy Code gives a bankruptcy trustee authority to repudiate the debtor's contracts. See 11 U.S.C. 365(a), 1113.

conservator or receiver." 12 U.S.C. 1464(d)(6)(C) (1988).

In light of FSLIC's broad powers under federal law, California law could not vest respondent with a right to continued employment by FSLIC as receiver.[25] The purpose of the California common-law right to continued employment is to limit the ability of an employer simply to dismiss employees at will. That purpose is entirely at odds with the purposes underlying the grant to FSLIC as receiver of the unreviewable authority to employ personnel as it deems appropriate and to repudiate executory contracts in its sole discretion. To recognize a state-law-based right to continued employment in those circumstances would frustrate specific objectives of the federal banking receivership scheme, see *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979); indeed, the very essence of receivership is new management. Under standard preemption principles, the state-law right to continued employment had to give way to the powers of the federal receiver. See, *e.g.*, *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988); *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 152-154 (1982). Respondent had no legitimate expectation of continued employment—and no property interest in such employment —should Fidelity go into federal receivership.[26]

[25] Indeed, federal regulations applicable at the time of respondent's dismissal made clear that thrifts could not enter into contracts for indefinite terms of employment. They provided that a federally insured thrift was forbidden from entering into employment contracts that "could materially interfere" with the board of directors' discretion regarding the employment of officers, such as by including "an excessive term" or failing to include "an appropriate termination for cause provision." 12 C.F.R. 563.39 (1982).

[26] Because respondent had no property right, it is not clear what issue would be presented to the decisionmaker at a hearing in this case. In procedural due process cases, the issue to be litigated at the hearing sought by the plaintiff is ordinarily whether some limitation on the property right created by state law has been met.

2. The court of appeals acknowledged the argument that respondent's purported entitlement to continued employment was "limited by the prospect of Fidelity's placement in receivership" and found that argument "appealing." Pet. App. 26a. But the court rejected it on the ground that "[t]he fact that federal and, arguably, state law conferred wide discretion to receivers to repudiate 'burdensome' contracts does not, retrospectively, annul the state entitlement." Pet. App. 26a.

The court's reasoning is flawed, for our argument is not that respondent's right was "retrospectively" annulled, but rather that from the beginning he had no legitimate expectation to continued employment by a federal receiver. The difference can be illustrated by transposing this case

See, *e.g.*, *FDIC* v. *Mallen*, 486 U.S. 230, 245 (1988) (whether statutory condition on removal of indicted bank officer had been satisfied); *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 535, 544 n.9 (1985) (whether employee had been terminated for cause under state law); *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 9-12 (1978) (whether termination of utility service was "for cause" under state law); *Mathews* v. *Eldridge*, 424 U.S. 319, 336 (1976) (compliance with federal standard for social security disability benefits).

Respondent's complaint alleges that had he been given a hearing, "he would have demonstrated * * * why he should not have been terminated from his employment." J.A. 28. That appears to embody the theory that the state law "good cause" standard would be applicable to the receiver's decision to discharge him. Under standard preemption principles, however, a federal receiver is simply not bound to act in accord with state law principles that conflict with his federal grant of power. Nor would the issue in a hearing be whether the receiver had complied with federal law. It is undisputed that federal law gave respondent no right to continued employment, and respondent had no cause of action against the federal receiver for alleged failures to exercise his discretion properly in making employment decisions. Respondent's real complaint appears to be a substantive complaint about the preemption of state law by federal law in this context, not a procedural one about the need to have a hearing prior to his discharge. Cf. *Atkins* v. *Parker*, 472 U.S. 115, 128-131 (1985).

to a purely state-law context. Suppose, for example, that California common law generally recognized both a right to continued employment absent good cause and the right of receivers not to be bound by pre-existing executory contracts.[27] If a case like this, not involving federal banking authorities, arose in California courts in a purely state context, it would perhaps be difficult to predict how those courts would decide the case—*i.e.*, whether those courts would find that the state-created right to continued employment did or did not oust the state-created right of a receiver to repudiate executory contracts. In either event, however, no due process issue would be raised; there could be no argument that, if the right to continued employment did not survive receivership, the State had somehow deprived respondent of a property interest that state law had previously granted him. The sole question in that case would be the substantive state-law question of whether the state-law right to continued employment extended to a receivership situation.

The same analysis applies here. California law could not supersede federal law, which makes a bank employee's contract rights subject to certain conditions. One such condition is the right of the federal banking receiver to employ such personnel as it deems appropriate or to repudiate executory contracts. Thus, respondent's substantive property rights never included a right to continue in the employment of a bank in receivership. A legal limitation on contract rights—whether imposed by state or federal law—is simply not a deprivation of property. See *Texaco, Inc.* v. *Short*, 454 U.S. 516 (1982) (State does not deprive persons of property when it limits the

[27] California law appears to recognize both rights. Compare Pet. App. 22a & n.18 (citing California cases concerning right to continued employment) with *Irving Trust Co.* v. *Densmore*, 66 F.2d 21, 23 (9th Cir. 1933) (recognizing right of receiver to repudiate contracts under California law); *H.D. Roosen Co.* v. *Pacific Radio Publishing Co.*, 11 P.2d 873, 876 (Cal. Ct. App. 1932) (same).

scope of those rights by providing that they are extinguished upon the occurrence of certain events); *Hudson Water Co.* v. *McCarter*, 209 U.S. 349, 357 (1908) (Holmes, J.) ("One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter.")

3. That conclusion is supported by this Court's decisions in related areas. Aside from respondent's state-created right to continued employment absent good cause, numerous other contractual rights were altered or invalidated when FSLIC was appointed receiver for Fidelity. For example, under the doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 456 (1942), a party may not assert an agreement not reflected in a bank's official records as a defense to an FDIC suit for payment on a note. Even if such an unrecorded side agreement were fully supported by consideration and would give the party asserting it valuable rights under state law, it could not be asserted against the FDIC.

Respondent's position is exactly parallel to that of a party asserting an unwritten side agreement in a case governed by *D'Oench*. As in a *D'Oench* case, respondent claims that under state law he held a valuable contract right, and that the appointment of a federal receiver invalidated that right. Yet this Court has never viewed *D'Oench* or the related statutory provisions in 12 U.S.C. 1823(e), see *Langley* v. *FDIC*, 484 U.S. 86 (1987), as constitutionally suspect under the Due Process Clause, and the lower courts have consistently rejected constitutional challenges to the *D'Oench* doctrine. See, *e.g.*, *FSLIC* v. *Griffin*, 935 F.2d 691, 698 (5th Cir. 1991); *Campbell Leasing, Inc.* v. *FDIC*, 901 F.2d 1244, 1248 (5th Cir. 1990). The reason, as in this case, is that the claimant in *D'Oench* never obtained a contract right to enforce an unrecorded side agreement against a federal

receiver who comes into possession of his note. See *Campbell*, 901 F.2d at 1248. As in this case, the application of the *D'Oench* doctrine does not result in the deprivation of any state-created property right.

4. The court of appeals relied on *FDIC* v. *Mallen*, 486 U.S. 230 (1988), to support its conclusion that Meyer had a property interest in continued employment. *Mallen*, however, does not cast any doubt on the conclusion that employees of financial institutions in federal receivership do not have the same property rights that may have attached prior to the receivership. In *Mallen*, a bank officer was suspended pursuant to a federal statute requiring suspension of bank officers indicted for felonies involving dishonesty or breach of trust. 486 U.S. at 233. Suspension was not automatic, however. The agency was required to make findings concerning the threat posed to the interests of the depositors in order to support imposition of that sanction. *Id.* at 234-235.

The scope of the bank employee's property rights were not at issue in *Mallen*. The Court agreed with the parties that the officer's "interest in the right to continue to serve as president of the bank and to participate in the conduct of its affairs is a property right protected by the Fifth Amendment Due Process Clause." *Id.* at 240. The question was not whether the employer had a right to continue in his employment when the statutory cause for suspension had occurred, but only the type of procedures that were required to determine the facts.

In contrast, FSLIC did have the authority to remove respondent without a determination of cause, in accordance with its policy of dismissing the top management of a failed thrift at the time of receivership. In those circumstances, there is no factual issue that must be the subject of a due process inquiry. Because respondent had no substantive right to be dismissed only for cause, he had no procedural right to a hearing on that issue. See *Reno* v. *Flores*, 113 S. Ct. 1439, 1449-1450 (1993).

B. Even If Respondent Was Deprived Of A Property Interest, Respondent's Postdeprivation Remedies Provided Him All The Process That Was Due

Even if respondent's state law rights survived Fidelity's takeover by FSLIC, his claim under the Due Process Clause would fail. In *Parratt* v. *Taylor*, 451 U.S. 527, 539 (1981), this Court recognized "that either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the [government's] action at some time after the initial taking, can satisfy the requirements of procedural due process." See also *Zinermon* v. *Burch*, 494 U.S. 113, 129 (1990); *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982). The Court in *Parratt* relied on a long line of cases permitting the government to take action that affected private property rights prior to affording a hearing to the owner, where there was need for immediate action. See 451 U.S. at 538-539. The holding of *Parratt* was reaffirmed and extended in *Hudson* v. *Palmer*, 468 U.S. 517 (1984), and the rationale of *Parratt* and *Hudson* govern this case.

1. The "necessity of quick action" mentioned in *Parratt* is always present when a banking institution is threatened with failure. In that situation, federal takeover followed by closure and liquidation of the institution can have grave consequences. When an institution is closed, accounts are frozen, checks are returned, uninsured deposits are generally lost, and even insured deposits may not be paid for a period of months. See, *e.g.*, *NCNB Texas Nat'l Bank* v. *Cowden*, 895 F.2d 1488, 1496 (5th Cir. 1990). The institution loses its value as a going business, and the ultimate costs to the federal insurance fund are correspondingly greater. Not incidentally, all of the institution's employees lose their jobs. Finally, insofar as the closure causes a general loss of public confidence in the banking system, otherwise healthy institutions can be

pushed into failure, with even greater losses to the insurance system and to the economy as a whole.

To avoid simply closing the doors of a failed bank and liquidating its assets, banking authorities frequently arrange for "purchase and assumption" transactions, in which either an existing, healthy financial institution or a newly created one purchases some or all of the assets and assumes some or all of the liabilities of the failed institution, with assistance from the deposit insurance fund. See, *e.g., FDIC* v. *Bank of Boulder,* 911 F.2d 1466, 1469-1471 & nn.1 & 3 (10th Cir. 1990), cert. denied, 111 S. Ct. 1103 (1991). In such a transaction, depositors generally receive uninterrupted service. Such transactions are ordinarily less costly than simple liquidation, and they tend to strengthen—rather than diminish—public confidence in the banking system.

As this Court has recogized, in order to make a purchase and assumption transaction feasible, banking authorities must act "with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services." *Langley* v. *FDIC,* 484 U.S. at 91 (internal quotation marks omitted). Although receivers may need to shed excess costs in order to make the institution attractive to a purchaser, immediate termination of the employment of top management is justified by more than merely the need to cut costs. The receiver no longer needs the assistance of top management. And the acquiring institution ordinarily seeks to place its own personnel in charge and is not eager to keep in place the former management, which was responsible for or associated with the policies that led to the institution's failure.

The need for prompt action is inconsistent with providing management employees—as well, presumably, as all other parties whose contracts with the failed institution are repudiated—with predeprivation notice and hearing. This Court recognized that interest when it held that a bank officer may be suspended without a predeprivation hearing where prompt action is necessary "to protect the interests of depositors and to maintain public confidence in our banking institutions." *FDIC* v. *Mallen,* 486 U.S. at 241. In *Mallen,* the officer was suspended pursuant to federal regulations after having been indicted. Although his need for continued employment would appear to have been identical to respondent's in this case, the exigency requiring prompt action was, if anything, substantially less than the need for immediate action here.[28] Similarly, in *Fahey* v. *Mallonee,* 332 U.S. 245 (1947)—one of the cases upon which this Court relied in *Parratt,* see 451 U.S. at 539—this Court held that summary appointment of a federal conservator for an endangered thrift institution did not violate the Due Process Clause, notwithstanding the failure to grant the stockholders a predeprivation hearing. The Court relied on the "delicate nature of the institution and the impossibility of preserving credit during an investigation" as exigencies that justified the summary action. 332 U.S. at 253-254. Compare *First Federal Savings Bank & Trust* v. *Ryan,* 927 F.2d 1345, 1357-1358 (6th Cir.), cert. denied, 112 S. Ct. 187 (1991). The same factors that guided this Court's decisions in *Mallen* and *Fahey* require the federal receiver, once the institution has been seized, to act summarily with respect to employment and other contracts, so that ultimate disposition of the institution as a going concern is possible.[29]

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[28] See also *Barry* v. *Barchi,* 443 U.S. 55, 65 (1979) (prompt suspension of horse trainer's license necessary to protect "the State's interest in preserving the integrity of the sport and in protecting the public from harm"); *Mackey* v. *Montrym,* 443 U.S. 1 (1979) (suspension of driver's license for refusal to submit to breathalyzer test); *Hewitt* v. *Helms,* 459 U.S. 460, 472 (1983) (confinement of prisoner to administrative segregation); *Mathews* v. *Eldridge,* 424 U.S. 319 (1976) (full-scale predeprivation hearing not required before termination of disability benefits).

[29] Similar exigencies were found to justify summary government action in *Haig* v. *Agee,* 453 U.S. 280, 302 (1981) (denial of passport); *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974) (summary seizure of yacht used for drug smuggling);

This Court's decision in *Cleveland Bd. of Educ.* v. *Loudermill,* 470 U.S. at 542-545, is not to the contrary. In that case, the court held that a predeprivation hearing was necessary before school employees who had an expectation of continued employment were fired. In *Loudermill,* there was no public exigency that required summary removal of the employees from the public payroll. To the contrary, in evaluating the public interest in prompt action, the Court noted that "[i]t is preferable to keep a qualified employee on than to train a new one" and that the government has an "interest in keeping citizens usefully employed rather than taking the possibly erroneous and counterproductive step of forcing its employees onto the welfare rolls." 470 U.S. at 544. Neither of those factors are applicable to an employee of a failed thrift institution, who has no claim to public funds or public employment. Indeed, the imposition of predeprivation hearing requirements would jeopardize the jobs of the institution's other employees, as well as public confidence in the deposit insurance system, by making it much more difficult to act quickly to preserve as much as possible of the failed institution.

2. Respondent had two distinct postdeprivation remedies available in this case. First, he could have filed a claim with the receiver for the value of any contractual rights he believes to have been violated. Second, he could have filed suit in federal court against the receiver to assert any such claim. Those remedies provided respondent with all the process he was due.

a. At the time of the events in this case, FSLIC's governing statute and regulations provided for the determi-

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Ewing **v.** ***Mytinger & Casselberry, Inc.,*** **339 U.S. 594, 600 (1950) (seizure of misbranded drugs);** ***Bowles*** **v.** ***Willingham,*** **321 U.S. 503, 521 (1944) (wartime rent control);** ***Stoehr*** **v.** ***Wallace,*** **255 U.S. 239 (1921) (seizure of aliens' property during wartime);** ***Central Union Trust Co.*** **v.** ***Garvan,*** **254 U.S. 554 (1921) (same);** ***Phillips*** **v.** ***Commissioner,*** **283 U.S. 589 (1931) (summary collection of taxes due);** ***North American Cold Storage Co.*** **v.** ***City of Chicago,*** **211 U.S. 306 (1908) (seizure of diseased meat).**

nation of claims submitted to it as receiver of state-chartered institutions such as Fidelity. 12 U.S.C. 1729(d) (1988); 12 C.F.R. 569a.6, 569a.7 (1982). There was no bar to respondent's submission of a claim to the receiver for any contract violation that he believed had been committed, and there is no basis for believing that respondent's claim, if valid, would not have been allowed by FSLIC. See generally *Coit Independence Joint Venture* v. *FSLIC,* 489 U.S. at 580-581.

Respondent has asserted in this litigation that the claims process was inadequate. In respondent's view, FSLIC's failure to create suitable claim forms and publish a notice concerning their availability violated FSLIC's own regulations governing the claims process. See, *e.g.*, Resp. Br. in Opp. 14-15 n.2.

Respondent's view is mistaken. The regulation that required creation of forms and publication of notice to creditors was 12 C.F.R. 569a.8 (1982), which provided for creditors to be told that they must submit claims on specified forms on or before a specified date. That regulation, however, did not apply to purchase and assumption transactions, such as the one that took place when Fidelity was placed in receivership and its assets were purchased by the newly chartered Fidelity Federal. Under 12 C.F.R. 569a.13 (1982), "[t]he requirements set forth in [section 569a.8] shall not apply to the Corporation as receiver for an institution that becomes the subject of a purchase and assumption transaction." [30] Accordingly, respondent was free to submit a claim and upon its approval would have received its value out of the receivership estate on a pro rata basis with any other creditors. See 12 C.F.R. 569a.7 (1982).

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[30] A FSLIC official testified at a deposition that no notice was published because the transaction was a purchase and assumption transaction and that "the receiver will consider" any claim that is not transferred to the purchaser of the institution. Deposition of Lawrence Hayes, 7/2/87, at 31. He also testified that there would be no time limit applicable to such a claim. ***Id.*** **at 32.**

b. Aside from the administrative claims process, this Court made clear in *Coit* that respondent could have filed a claim in federal court against the receiver for breach of contract, and the court would have been required to provide him with a *de novo* determination of that claim. See 489 U.S. at 578-579. Indeed, Count 8 of Meyer's First Amended Complaint in this case—which he later dropped—pleaded just such a claim against FSLIC. C.A. Excerpts of Record 11.[31] Accordingly, regardless of whether the claims process was available to respondent, the federal court remedy provided him fully adequate process to obtain relief for any contractual violation.

In *Parratt* and *Hudson*, this Court held that state tort remedies provided all the process that was due for unauthorized deprivations of property interests by state actors. There is no reason not to extend that analysis to cases such as this one, in which a postdeprivation suit for breach of contract provides a fully adequate remedy.

First, although this Court's cases have recognized the need for a prompt remedy in cases involving termination of employment, that need has arisen in each case in part from the possibility that the employee could be reinstated—or continued—in his job if the termination proved unjustified. See, *e.g.*, *FDIC* v. *Mallen*, 486 U.S. 230 (1988); *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. at 543; *Barry* v. *Barchi*, 443 U.S. at 66 (1979). In this case, as in other receivership situations, respondent's former employer went out of business on the day the receiver was appointed and thus had neither the need nor the capability to continue to employ him. Thus, the

[31] FSLIC's trial counsel moved to dismiss that Count on the ground (erroneous, in our view) that under the Tucker Act, 28 U.S.C. 1346(a)(2) and 1491(a)(1), only the Claims Court would have had jurisdiction over respondent's breach of contract claim. Respondent neither filed suit in the Claims Court nor continued to litigate the district court's jurisdiction over his claim for breach of contract. Instead, he simply dropped the breach of contract claim when he filed his Second Amended Complaint, see J.A. 17-46, before the district court had any occasion to reach the issue.

most that is at issue in this case is respondent's right to contract damages. As *Parratt* and *Hudson* make clear, a claim for damages is precisely the sort of claim that under traditional principles can "adequately redress the loss." *Zinermon* v. *Burch*, 494 U.S. at 129.[32] Indeed, it would be astonishing if a suit for damages were inadequate under the Due Process Clause to redress a purely monetary claim.[33]

Second, a postdeprivation suit for breach of contract is especially well suited to receivership situations. Even assuming that respondent retained a right to continued employment even after his employer went into receivership, that interest under California law is simply a right to sue for breach of contract. See Pet. App. 20a-21a n.17, 22a-23a n.18 (both quoting *Foley* v. *Interactive Data Corp.*, 765 P.2d 373, 401-402 (Cal. 1988)). There is no basis for granting respondent preferred status with respect to other contract creditors of the employer's estate; remitting respondent to the same remedy that is available to other creditors permits a full determination of each claim and a rational distribution of the estate's assets.

Finally, this Court has held that procedures that may easily take at least as long as a federal court suit satisfy

[32] In the analogous bankruptcy setting, due process requires only that a party injured by the repudiation of a contract have the opportunity to submit a claim—not to demand specific performance—that will be paid in accordance with whatever reasonable priorities are fixed by law. See, *e.g.*, *Kuehner* v. *Irving Trust Co.*, 299 U.S. 445, 451-452 (1937); *Continental Illinois Nat'l Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry.*, 294 U.S. 648, 680-681 (1935); *Hanover Nat'l Bank* v. *Moyses*, 186 U.S. 181 (1902).

[33] Any other result would convert every claim of government breach of contract remediable only by litigation into a violation of the Due Process Clause, thereby inappropriately making that Clause "a font of [contract] law to be superimposed upon whatever systems may already be administered." *Parratt* v. *Taylor*, 451 U.S. at 544 (quoting *Paul* v. *Davis*, 424 U.S. 693, 701 (1976)).

due process requirements. For example, in *Mathews* v. *Eldridge*, the postdeprivation process at issue included initial agency review of a disability determination, followed by an evidentiary hearing before an administrative law judge, discretionary review by an appeals council, and judicial review in district court. 424 U.S. at 339. The Court's holdings in *Parratt* and *Hudson* necessarily rest on similar findings.

c. In sum, even if respondent was deprived of a property interest, the receivership claims process and the possibility of a contract suit in federal court provided constitutionally adequate remedies. In light of those remedies, respondent's claim fails to state a constitutional violation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 1993

APPENDIX

STATUTORY PROVISIONS

1. 28 U.S.C. 1346(b) provides:

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. 28 U.S.C. 2677 provides:

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

3. 28 U.S.C. 2679(a) and (b) provide:

Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for in-

jury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

> (A) which is brought for a violation of the Constitution of the United States, or
>
> (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

4. 28 U.S.C. 2680 provides, in pertinent part:

Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omission of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

5. 12 U.S.C. 1725(c) (1988) provided, in pertinent part:

On June 27, 1934, the [Federal Savings and Loan Insurance] Corporation shall become a body corporate, and shall be an instrumentality of the United States, and as such shall have power—

* * * * *

(4) To sue and be sued, complain and defend, in any court of competent jurisdiction in the United States or its Territories or possessions or the Commonwealth of Puerto Rico, and may be served by serving a copy of process on any of its agents or any agent of the Federal Home Loan Bank Board and mailing a copy of such process by registered mail or by certified mail to the Corporation at Washington, District of Columbia.

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No. 92-741

In The
Supreme Court of the United States
October Term, 1992

FEDERAL DEPOSIT INSURANCE CORPORATION,
Petitioner,
v.
JOHN H. MEYER, ET AL.,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Federal Savings and Loan Insurance Corporation (FSLIC) may be held liable for damages arising out of an alleged violation of the Due Process Clause pursuant to a right of action implied under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

2. Whether FSLIC, acting as receiver for a failed savings and loan institution, violated the Due Process Clause by dismissing an officer of the institution without affording any opportunity for a hearing.

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BRIEF FOR RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides: "nor shall any person * * * be deprived of life, liberty, or property, without due process of law." The pertinent statutory provisions are reprinted in an appendix to this brief.

STATEMENT

1. Respondent John H. Meyer joined Fidelity Savings and Loan (Fidelity) in 1966 and remained employed until April 13, 1982, at which time he was discharged by the Federal Savings and Loan Insurance Corporation

(FSLIC). On that same day, FSLIC had been appointed receiver of Fidelity by the Federal Home Loan Bank Board. J.A. 72, 74.[1]

a. During Meyer's 16 year tenure, he was involved primarily in administration of Fidelity's multi-branch system. As of April, 1982, Meyer's position at Fidelity was Executive Vice President in charge of branch operations, a position that put him in charge of administration for 80 branches. 4 Tr. 389-90. At this position, Meyer was responsible for negotiating leases, certain personnel matters and general administrative management of the branches. Meyer never had responsibility for Fidelity's loan policies. J.A. 72-3.

b. During his tenure, Meyer received frequent promotions and commendations, and Fidelity had a general policy of terminating employees only upon a showing of good cause. Pet. 23a.

2. In 1979, Fidelity began experiencing financial difficulties as a result of its loan policies. Assuming that interest rates would fall, Fidelity sold large amounts of short-term paper in order to obtain the funds to make long-term mortgage loans at the current market rates. When interest rates rose sharply, Fidelity suffered substantial operating losses and a decrease in net worth

[1] FSLIC was abolished in 1989 when the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 was passed. Pursuant to Section 401(f)(2) of FIRREA 103 Stat. 356, the Federal Deposit Insurance Corporation (FDIC) was substituted for FSLIC as defendant in this suit. Thus, FDIC is the petitioner in this Court although it is the conduct of FSLIC which is the subject matter of the action. The distinction between FDIC as the current litigant and FSLIC as the party whose conduct is in question, has been preserved in this brief.

because the earnings on its low yielding portfolio were less than the increasing cost of its short-term borrowing. J.A. 73.

3. Because of these financial difficulties, on April 13, 1982, the Savings and Loan Commissioner of the State of California appointed FSLIC as state receiver. At the close of business on that date, the Commissioner seized Fidelity's assets. On that same date, the Federal Home Loan Bank Board appointed FSLIC as federal receiver of Fidelity, replacing the state receivership by operation of federal law. J.A. 74.

4. On April 13, 1982, FSLIC and its special representative, Robert Pattullo, terminated the employment of Meyer and three other Fidelity employees.

a. A letter was hand-delivered to Meyer which stated: "You are hereby discharged from all employment with Fidelity Savings and Loan Association, its subsidiaries and service corporations". 2 Tr. 100. Neither before nor after receipt of the letter was Meyer given the reasons for his termination, nor an opportunity to indicate why he should not be terminated, nor notification of any right to object to his termination, nor an opportunity to present evidence as to why the decision to terminate him should be changed. J.A. 74-5. Meyer was also denied the opportunity to appeal the decision or present evidence to challenge it in any subsequent proceeding. Pet. 3a.

b. After appointing FSLIC as receiver of Fidelity, the Federal Home Loan Bank Board created a new thrift institution, Fidelity Federal Savings and Loan of San Francisco. Most of the assets and liabilities of Fidelity were transferred to this new institution which was eventually sold to Citicorp Corporation. J.A. 74.

c. All Fidelity executive employees not terminated by FSLIC, including vice presidents, were retained by

Citicorp. 3 Tr. 193-94. Citicorp had a specific policy whereby Fidelity employees maintained their jobs at a salary scale commensurate with or higher than Fidelity's. 3 Tr. 171, Exhibit III (Deposition of Joyce Vallecorse, 12/12/85 at 16). Additionally, Citicorp continued to implement Fidelity's policy that termination would occur only for just cause. 3 Tr. 171, Exhibit III (Deposition of Joyce Vallecorse, 12/12/85 at 16). After being terminated Meyer had great difficulty in finding gainful employment. Only after three years, and moving from California to the east coast, was Meyer able to find work, and then only in a lesser position at a much reduced salary. 4 Tr. 420-23.

5. Relying on the Court's decision in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), Meyer filed an action for damages against various defendants, including FSLIC. Meyer alleged that under California law he had a property right to continued employment with Fidelity absent just cause for dismissal. J.A. 23. He also alleged that his discharge without notice or a hearing violated his Fifth Amendment right to due process prior to a deprivation of property. J.A. 28-29.

The jury returned a verdict in favor of Meyer and against FSLIC in the amount of $130,000. J.A. 78. In a special verdict, the jury found that pursuant to California law and the facts presented, Meyer had a legitimate claim of entitlement to employment or a reasonable expectation of continued employment arising out of an implied contract with Fidelity. J.A. 77. The jury further found that FSLIC failed to provide Meyer with a hearing, the reasons for his discharge, and an opportunity to contest the reasons for his discharge before his termination. J.A. 77-8.

6. The court of appeals affirmed the jury verdict. The court rejected arguments by FDIC that the trial court lacked authority to award damages against a federal agency under *Bivens*, and that FSLIC had not violated Meyer's constitutional rights.

a. The court of appeals ruled that the sue-and-be-sued clause found in FSLIC's organic legislation constituted a general waiver of sovereign immunity. Pet. 5a.

The court acknowledged that the sue-and-be-sued clause would not provide a waiver of sovereign immunity if Meyer's claim were deemed "cognizable" under 28 U.S.C. § 1346(b), the main jurisdictional provision of the Federal Tort Claims Act (FTCA). 28 U.S.C. § 2679. However, the court noted that Section 1346(b) only refers to – and waives sovereign immunity for – governmental wrongs "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" (28 U.S.C. § 1346(b)). Accordingly, constitutional torts, which by definition are based on the Constitution rather than local law, were found by the court of appeals to be implicitly excluded from the coverage of the FTCA. The court further held that such implicitly excluded claims are not "cognizable" under the FTCA. Pet. 6a-7a, 11a.

b. The court of appeals also concluded that Meyer's dismissal without a hearing violated due process. Pet. 21a-28a. The court held that California law provided respondent with a legitimate claim of entitlement and that under *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972), such an entitlement was a property interest deserving of due process protection. *Id.* Noting that "federal receivership law reflects the urgency of the situation facing savings and loan institutions" and that "the right

given receivers to dispose expeditiously of burdensome contracts is an out-growth of this emergency * * * ." (Pet. 28a), the court nevertheless held that "the weight of the federal interest goes to the question of *what*, not *whether*, process is due." *Id.* The court further found that "the facts alleged in this case suggest that the FSLIC arbitrarily terminated some employees while retaining others." *Id.* Observing that Meyer was never given any opportunity to hear or be heard, the court relied on *Goss v. Lopez*, 419 U.S. 565 (1975), for the proposition that "at a minimum, Meyer must be given *some* kind of notice and afforded *some* kind of hearing – rudimentary precautions guaranteed by the due process clause." *Id.* (internal quotation marks omitted).

SUMMARY OF ARGUMENT

I. Since *Bivens v. Six Unknown Named Agents*, supra, 403 U.S. 388 (1971), the Court has authorized compensatory damages as a means to vindicate the deprivation of individual rights guaranteed by the Constitution. Sometimes referred to as constitutional tort claims, such actions were recognized in *Bivens* despite the absence of statutory authorization. While the action recognized in *Bivens* was prosecuted against individual government agents, there is no compelling reason why a constitutional tort claim should not be permitted, as by the court of appeals, against a sue-and-be-sued government entity. The logic utilized by the Court in *Bivens* to imply a damages remedy against individual government agents applies with equal force to sue-and-be-sued agencies and there are no special factors counselling hesitation which would compel the Court to stay its hand. Further, the sue-and-be-sued language in FSLIC's organic legislation represents a general waiver of sovereign immunity. As noted

by the court of appeals, since *Bivens*-type actions are based on the federal Constitution, rather than local common law, they are not cognizable under the Federal Tort Claims Act (FTCA) nor limited or diminished by its provisions.

A. The judiciary plays a special role in enforcement of individual rights guaranteed by the Constitution. While Congress has the prerogative to create a remedy for constitutional deprivations, its authority to do so is not exclusive. In the absence of Congressional action, *Bivens*-type actions are appropriately entertained by the federal courts which employ a conventional judicial remedy – compensatory damages – when no meaningful alternative remedy exists. Such actions have been used to vindicate deprivations of due process guaranteed by the Fifth Amendment such as that claimed by Meyer. *Davis v. Passman*, 442 U.S. 228 (1979).

For reasons of comity with coordinate branches of government, the Court has declined to enforce constitutional tort remedies where special factors counsel hesitation in the absence of affirmative action by Congress, or where Congress has provided an alternative remedy as a substitute for recovery directly under the Constitution. *Carlson v. Green*, 446 U.S. 14 (1980). No special factors counsel hesitation in this case, even though the action is brought against a sue-and-be-sued agency, rather than an individual agent, and Congress has not created a substitute alternative remedy.

Contrary to FDIC's assertion, the fiscal impact of a *Bivens*-type action against a sue-and-be-sued agency is similar to the impact of such an action against an individual agent. All constitutional tort claims – even those brought against individual agents – have the potential to

impact the federal fisc because individual agent defendants are routinely provided indemnity by government employers for such actions. Nor would an action against FSLIC violate the Appropriations Clause of the Constitution. Congress has appropriated funds to finance FSLIC's programs and the issues raised by this action only concern the rules that govern those appropriations. The fundamental prerogative of the Court to interpret the laws and to declare Congressional acts or conduct of the Executive unconstitutional often impacts on the federal Treasury, directly or indirectly. Even where the substantive right sued upon is grounded in statutory or constitutional provisions establishing only non-monetary duties, the Court can imply a right to damages for injuries resulting from a breach of those duties. *United States v. Mitchell*, 463 U.S. 206 (1983).

B. Sovereign immunity from this action was waived in the sue-and-be-sued clause of FSLIC's organic legislation. Such clauses are to be broadly construed as general waivers of sovereign immunity unless the suit in question is inconsistent with a statutory or constitutional scheme, an implied restriction of the general waiver is necessary to avoid a grave interference with the performance of a governmental function, or it appears plainly to have been the purpose of Congress to use the sue-and-be-sued clause in a narrow sense. *Loeffler v. Frank*, 486 U.S. 549, 554-55 (1988); *Federal Housing Administration v. Burr*, 309 U.S. 242, 245 (1940). None of these factors would dictate a narrow reading of the sue-and-be-sued clause in this case.

Congress has not provided a remedy for the constitutional deprivation claimed by Meyer. FDIC urges that the action be restricted by the limitations of the FTCA. However, sue-and-be-sued waivers are limited by the FTCA only as to claims that are "cognizable" under 28 U.S.C.

§ 1346(b). 28 U.S.C. § 2679(a). Meyer's action is implicitly excluded from – and not cognizable under – the FTCA because Section 1346(b) refers only to common law tort actions (acts wrongful "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred". (28 U.S.C. § 1346(b)).

The process due Meyer was not elaborate; he was entitled at a minimum to notice and an opportunity to present reasons, in person or in writing, why the proposed action should not be taken against him. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). Enforcement of this minimal protection would not threaten a grave interference with a governmental function.

II. Meyer had a property interest in his job because he had a legitimate claim of entitlement to continued employment absent just cause for dismissal. This interest could not be taken from him by governmental action unless he was provided with at least minimal due process prior to his termination. While FSLIC had broad authority to act promptly in response to the circumstances surrounding a troubled financial institution, Meyer's constitutional rights could not be sacrificed to that authority. Post-deprivation contract claims suggested by FDIC as a substitute for a pre-termination hearing are illusory, at best, and would not provide Meyer the process he was due.

A. While the Constitution provides due process protection for property interests, such interests are created and their dimensions defined by independent sources such as state law. *Board of Regents v. Roth*, supra, 408 U.S. at 577. It is undisputed that under California law Meyer had an enforceable implied contract right to continued employment absent just cause for dismissal. FDIC

Br. 30. The dimensions of this implied contract right were consistent with the federal rules regulating savings and loan employee contracts (12 C.F.R. § 563.39 (in effect on April 13, 1982)) and its scope could not be diminished by the procedure established to terminate it, the Court having rejected such a "bitter with the sweet" approach in *Cleveland Bd. of Educ.*, supra, 470 U.S. at 541. Further, while FSLIC had the power to "[r]eject or repudiate any lease or contract which it consider[ed] burdensome" (12 C.F.R. § 569a.6(c)(3) (in effect on April 13, 1982)), a right of impacted individuals to notice and a meaningful opportunity to be heard must be implied when that authority is exercised. *Burns v. United States*, 501 U.S. ___, 111 S. Ct. 2182, 115 L. Ed. 2d 123, 132-3 (1991).

B. The process due Meyer was notice and an opportunity to be heard *prior to* his discharge. *Cleveland Bd. of Educ.*, supra, 470 U.S. at 542. The post-termination contract claims suggested as a substitute by FDIC are wholly illusory. Meyer's claim is based on a constitutional tort theory; that is, he claims a deprivation of due process in the procedure leading to the repudiation or rejection of his implied employment contract. Post-deprivation contract claims would have been defeated and would not have addressed the constitutional violations which are the gravamen of Meyer's claim.

ARGUMENT

I. UNDER *BIVENS* AND ITS PROGENY, A RIGHT OF ACTION FOR DAMAGES IS APPROPRIATE AGAINST SUE-AND-BE-SUED AGENCIES, SUCH AS FSLIC, CONSEQUENT UPON A DEPRIVATION OF DUE PROCESS, EVEN IN THE ABSENCE OF EXPRESS CONGRESSIONAL AUTHORITY

In *Bivens v. Six Unknown Named Agents*, supra, 403 U.S. 388 (1971), the Court found damages an appropriate remedy to vindicate the deprivation of constitutional rights. Often referred to, in shorthand, as "constitutional torts," such actions were permitted even though no statute provided for them. *Carlson v. Green*, supra, 446 U.S. at 18.

FSLIC deprived Meyer of his constitutionally-protected property interest in employment by terminating him without affording even the most rudimentary elements of due process. The conduct leading to this deprivation amounted to a constitutional tort entitling Meyer to compensatory damages. While *Bivens*-type cases have previously been permitted by this Court only against individual agents, the logic of *Bivens* would apply equally to authorize constitutional claims against sue-and-be-sued agencies, as recognized by the court of appeals. Actions against sue-and-be-sued agencies would be consistent with the judiciary's special role in enforcement of constitutional rights guaranteed to individuals and no special factors would counsel hesitation from such actions.

Sovereign immunity from Meyer's claim was waived by Congress in the sue-and-be-sued language of FSLIC's organic legislation. Moreover, the claim is not grounded in common law tort and, accordingly, is not "cognizable"

under the Federal Tort Claims Act ("FTCA"). The limitations of the FTCA relating to common law torts are inapplicable to Meyer's claim.

A. The Judiciary Has The Prerogative And Duty To Authorize Damages Against FSLIC As A Remedy For Violation Of A Constitutionally-Protected Right

1. While the Constitution preserves to the people those critical entitlements outlined in the Bill of Rights, it is generally silent on remedies available to vindicate deprivations. However, in its "great outlines" the Constitution grants to the judiciary the primary role for enforcement of individual rights. *Davis v. Passman*, supra, 442 U.S. at 241, quoting, *McCulloch v. Maryland*, 4 Wheat 316, 407, 4 L. Ed. 579 (1819). And the Court has recognized that it has the "power – and therefore the duty – to make principled choices among traditional judicial remedies" to redress or prevent constitutional violations. *Bivens v. Six Unknown Named Agents*, supra, 403 U.S. at 408, n.8 (Harlan, J., concurring). Consistent with this power and duty, the Court has implied a number of remedies to vindicate constitutional wrongs including injunctions (See, *Younger v. Harris*, 401 U.S. 37, 43-47 (1971)) and the exclusionary rule (*Mapp v. Ohio*, 367 U.S. 643, 648-50, 655-60 (1961)). And in *Bivens* the Court utilized compensatory damages to redress the violation of a Bill of Rights entitlement. The Court implied a remedy in damages despite Congressional silence and without legislative authorization.

The Court notes in *Bivens* that it had been urged to defer to state tort remedies but refused to do so. *Bivens v. Six Unknown Named Agents*, supra, 403 U.S. at 393. Distinguishing between common law torts and invasions of

constitutionally protected rights, the Court observed that an agent acting in the name of the United States has much greater capacity for harm than a private individual and that the Fourth Amendment proscribes conduct much broader than that addressed by the common law of torts. *Id.* at 392. Indeed, the interests protected by the common law of torts, and those protected by the Constitution can be inconsistent or even hostile. *Id.* at 394.

The Court had also been urged to avoid creation of a judicial remedy where Congress had not acted, at least where such a remedy was not "essential * * * or indispensable for vindicating constitutional rights". *Id.* at 406 (Harlan, J., concurring) (internal quotation marks omitted).[2] But because individual rights are central to our Constitutional democracy, the judiciary should apply "remedial mechanism[s] normally available in the federal courts" to redress injury occurring as a result of unconstitutional conduct by government agents. *Id.* at 397. " 'The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.' " *Id.* quoting *Marbury v. Madison*, 1 Cranch 137, 163, 2 L. Ed. 60, 69 (1803). In order to vindicate the violation of constitutional rights, the Court turned to the obvious and conventional remedy of compensatory damages. "That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have

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[2] As explained at more length below, pp. 23 to 25, Meyer had no other effective remedy for the deprivation of his Fifth Amendment rights and here the remedy allowed by the court of appeals is essential and indispensable for vindication.

been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id.* at 395.

While Congress also has the prerogative to create a remedy for constitutional deprivations, unless and until Congress does so, the Court has the authority to imply a remedy because "the power to authorize damages as a judicial remedy for the vindication of a federal constitutional right" is not reserved in the Constitution "exclusively in Congress' hands." *Id.* at 401-402 (Harlan, J., concurring). Where federally protected rights are invaded, courts should be alert to adjust their remedies to grant the necessary relief to vindicate the violation and "make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946).

Indeed, the role of the Court in vindicating Bill of Rights violations is most critical in the face of Congressional silence. The Bill of Rights was created to protect the interests of the individual from inappropriate exercise of popular will as expressed by the legislative majority. *Bivens*, supra, 403 U.S. at 407 (Harlan, J., concurring). Precisely because of its self-interest, Congress might be expected to move slowly in creating remedies for constitutional deprivations where they would impact on the workings of government. Note, *Rethinking Sovereign Immunity After* Bivens, 57 N.Y.U. L. Rev. 597, 663 (1982).

The special role of the judiciary in vindicating deprivations of individual rights, even in the face of Congressional silence, has been recognized from the early days of the Republic. The Constitution does not contain the specificity of a legal code but in its "majestic simplicity" the rights of individuals are designated and in its "great outlines" the judiciary is identified as the primary means through which those individual rights are enforced. *Davis v. Passman*, supra, 442 U.S. at 241 (citation omitted). As

the Court has noted, when James Madison presented the Bill of Rights to the Congress he emphasized the particular enforcement role to be assumed by the judiciary:

> If [these rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

Davis v. Passman, supra, 442 U.S. at 241-2, quoting I Annals of Congress 439 (1789).

In the absence of "a textually demonstrable constitutional commitment of [an] issue to a coordinate political department" it should be presumed that justiciable constitutional rights are to be enforced through the courts. *Davis v. Passman*, supra, 442 U.S. at 242 quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962). To give meaning to constitutional rights, the judiciary must be able to invoke its existing jurisdiction to award damages where there is no other effective means to vindicate wrongdoing. *Id.*

While *Bivens* concerned the Fourth Amendment, its logic has been used by the Court to imply damages as a remedy for violation of various constitutional provisions including the Due Process Clause of the Fifth Amendment. *Davis v. Passman*, supra, 442 U.S. at 242; See, also, *Bolling v. Sharp*, 347 U.S. 497 (1954); *Jacobs v. United States*, 290 U.S. 13 (1933). This implied right to damages, consequent on a violation of the Due Process Clause of the Fifth Amendment, is Meyer's only meaningful remedy and it is the gravamen of Meyer's cause of action against FSLIC.

2. In the exercise of prudent discretion and respect for coordinate branches of government, the Court has

declined to enforce constitutional tort remedies where there are "special factors counselling hesitation in the absence of affirmative action by Congress," or where Congress has provided an alternative remedy explicitly declared to be a substitute for recovery under the Constitution and viewed as being equally effective. *Bivens*, supra, 403 U.S. at 396-397; *Carlson v. Green*, supra, 446 U.S. at 18-19 (citations omitted). The authorization of an action directly against FSLIC implicates no special factors counselling hesitation and Congress has not created an equally effective substitute remedy.

FDIC suggests three special factors counselling hesitation (FDIC Br. 25-29) but none of these three, or any other factors, require the Court to stay its hand in this matter.

a. FDIC argues that a special factor counselling hesitation results from the potential impact on the federal fisc of the remedy implied by the court of appeals directly against a sue-and-be-sued agency. FDIC Br. 25-6.[3] FDIC made a similar argument in the Petition For Certiorari (Pet. 18-19). In response (Opp. to Pet., 11-12), Meyer pointed out that all *Bivens*-type actions have the potential to impact federal fiscal policy because individual agents are commonly provided indemnity by governmental employers for constitutional tort claims. See, eg., *Anderson v. Creighton*, 483 U.S. 635, 641, n.3 (1987); See, also, 28 C.F.R. § 50.15(c). While it is true that these indemnity rights are not absolute, any *Bivens* claim that results in indemnity by the government impacts, at least indirectly, on the federal Treasury.

[3] To FDIC, this action, as compared to *Bivens*, involves questions of "federal fiscal policy". *Bivens*, supra, 403 U.S. at 396, quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 311 (1947).

FDIC now expands its fiscal impact argument by claiming, based upon *OPM v. Richmond*, 496 U.S. 414 (1990), that recognition of Meyer's claim would violate the Appropriations Clause (Art. I, § 9, cl. 7) of the Constitution. However, there was no consensus, among the Justices writing opinions in *OPM*, for the proposition that the Appropriations Clause would bar the Court from ordering payments from a federal agency where payment is required to remedy a violation of the Due Process Clause.

In *OPM* the Court was called upon to decide whether estoppel would apply against the government after plaintiff relied to his detriment on erroneous advice by a governmental agent regarding disability benefit entitlements. The majority was careful to limit its ruling to the particular action before it and declined to rule that an estoppel claim would never succeed against the government. *OPM v. Richmond*, supra, 496 U.S. at 423. Regarding the Appropriations Clause, the first of three separate opinions observes that Congressional decisions on appropriations could validly be set aside by the Court where, for instance, they "violate a command of the Constitution such as the Just Compensation Clause," or where Congress would indirectly violate the separation of powers by, for example, impairing "the President's pardon power by denying him appropriations for pen and paper." *Id.* at 435 (White, J., joined by Blackmun, J., concurring). In a second separate opinion the Court's reliance on the Appropriations Clause is referred to as a "red herring". *Id.* at 435 (Stevens, J., concurring). According to this view, the question presented by the case did not turn on whether an appropriation had been made, but rather, centered on the rules that govern appropriations which "cover programs – not * * * individual payments". *Id.*

Finally, in the third separate opinion it is specifically noted that the Court:

> "[d]oes not decide whether the Appropriations Clause would bar the Judiciary from ordering payments from the Treasury contrary to a statutory appropriation either where such payment would be required to remedy a violation of another constitutional provision, such as the Due Process or Just Compensation Clause, or where Congress' refusal to appropriate funds would violate separation of powers."

Id. at 437, n.* (Marshall, J., joined by Brennan, J., dissenting).

Here, as in *OPM*, the Appropriations Clause is irrelevant because Congress had appropriated funds for FSLIC, and the pertinent questions for the Court only concern the rules that govern those appropriations. Appropriations to wholly owned government corporations such as FSLIC are made on an annual basis. 31 U.S.C. § 9104.[4] These funds are appropriated pursuant to "business-type budget[s]" which estimate "the financial condition and operations of the corporation" and "contain statements of financial condition, income and expense, and sources and use of money". 31 U.S.C. § 9103(a), (b)(1) and (b)(2). Congress is charged to annually provide "necessary appropriations authorized by law" and to make "corporate financial resources available for operating and administrative expenses". 31 U.S.C. § 9104(a)(2) and (a)(3). The use of some portion of these appropriated funds to pay damages to those injured by governmental wrongs, committed in the scope of the funded programs, is not an invasion of Congressional prerogative. It is,

[4] The laws in effect in April, 1982, 31 U.S.C. §§ 847-849, were re-codified on September 13, 1982 as 31 U.S.C. §§ 9103-9104. The recodification of Title 31 restated the law in a comprehensive form, without substantive changes. *See*, Pub. L. 97-258, § 1, Sept. 13, 1982.

rather, a proper judicial determination of how appropriated funds are to be spent when the programs are measured, as they must be, by the standards of the Due Process Clause.

More fundamentally, the Appropriations Clause should not bar the judiciary from implying a right of action against FSLIC where, as here, that cause of action is necessary to vindicate a violation of due process. Since *Marbury v. Madison* the Court has recognized that the separation of powers doctrine must be limited by the existence of judicial review. It is "emphatically the province and duty of the judicial department to say what the law is" and the Court has the authority to declare Congressional acts or conduct by the Executive unconstitutional. *Marbury v. Madison*, supra, 1 Cranch at 137.[5]

While the separation of powers doctrine requires the judiciary to "exercise a principled discretion when called upon to infer a private cause of action directly from the language of the Constitution" (*Davis*, supra, 442 U.S. at 252 (Powell, J., dissenting)), all constitutional tort claims involve review by the courts of the conduct of coordinate political departments, and in this sense the judiciary is always called upon to proceed with care when awarding

[5] In, Note, *Rethinking Sovereign Immunity After* Bivens, supra, 57 N.Y.U. L. Rev. at 661, the separation of powers doctrine, as it relates to *Bivens* actions, is discussed at length. It is persuasively argued that the separation of powers doctrine was justified and created as a precaution against "the aggregation of despotic power." *Id.* at 661. Thus, "[t]he doctrine of sovereign immunity, to the extent that it is understood as based upon the doctrine of separation of powers, must yield to the paramount justification of the separation of powers, the preservation of individual liberty." *Id.* at 662. This justification would be stood on its head were the separation of powers doctrine relied upon to bar a remedy for a deprivation of rights by a government entity which believes, as does FDIC, that it should be granted "unreviewable authority to * * * repudiate executory contracts in its sole discretion". FDIC Br. 32.

damages for such actions. *Bivens* actions have been permitted, subject possibly to qualified immunity, against a former congressman (*Davis*, supra), a cabinet officer, (*Butz v. Economou*, 438 U.S. 478 (1978)), and high ranking aides to the President (*Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). Where, as here, no meaningful alternative remedy is available for a constitutional deprivation, principled discretion should be exercised in the direction of permitting damages for constitutional violations.

Moreover, in contexts other than *Bivens*-type claims, the exercise of judicial review – and the Court's role in enforcing individual rights – will often impact on the federal fisc, at least indirectly.[6] An example of a direct

[6] An example of the diverse *indirect* fiscal impact of the Court's rulings on individual rights is found in the decisions enforcing, for indigent individuals, the right to assistance of counsel during criminal proceedings. The right to assigned counsel, which clearly impacts the federal Treasury when indigent defendants are provided attorneys at government expense, was first defined as a Sixth Amendment entitlement by the Court. *Johnson v. Zerbst*, 304 U.S. 458 (1938). Only in response to the Court did Congress promulgate Federal Rule of Criminal Procedure, Rule 44. See, Original Committee Note to Rule 44; 8B, Moore's Federal Practice, ¶ 44.01[2] ["The present extent of the right to counsel has been defined recently in *Johnson v. Zerbst*, 304 U.S. 458; * * * . The rule is a restatement of the principles enunciated in these decisions."] Subsequent enlargements of the scope of the right to counsel, which further impacted the federal fisc, came not from the Congress, but rather, from the Court. When Rule 44 was amended in 1966 to expand the entitlement, the rationale for change was again attributed to recent Court decisions. 1966 Committee Note to Rule 44; 8B, Moore's Federal Practice, ¶ 44.01[3] ["A new rule is provided as a substitute for the old to provide for the assignment of counsel to defendants unable to obtain counsel during all stages of the proceeding. The Supreme Court has recently made clear the importance of providing counsel both at the earliest possible time after arrest and on appeal." [citations

impact on the federal Treasury of a ruling of this Court, in the absence of an express congressional appropriation, is found in *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*). There the Court implied a right to damages as a remedy for violation of the fiduciary relationship owed by the government to Native American allottees. The relevant statutory provisions established, at most, a "nonmonetary duty" and Congress had not consented to – or appropriated funds for – suits for money damages. *Id.* at 232 (Powell, J., dissenting). Nevertheless, the Court found that the statutes did create a trust relationship, that the common law of trusts established that a trustee is accountable in damages for breaches of the trust, and that "it would be anomalous to conclude that these enactments create a right to the value of certain resources when the Secretary [of the Interior] lives up to his duties, but no right to the value of the resources if the Secretary's duties are not performed." *Id.*, at 226-7. Clearly, if the common law of trusts can be the predicate for money damages, despite the absence of a Congressional appropriation, the Court has an even more compelling prerogative to order damages in this action, pursuant to the "great outlines" of the Constitution which grants to the judiciary the primary role in the enforcement of the Bill of Rights. *Davis v. Passman*, supra, 442 U.S. at 241.

The separation of powers doctrine counsels care and a principled discretion in all exercises of judicial review which, of necessity, impact on the conduct of coordinate branches of the government. However, FDIC's argument, that the legislative prerogative to appropriate funds should prohibit any unauthorized judicial act that impacts on the federal fisc, if accepted, would eviscerate

omitted].] While Congress now appropriates funds to provide counsel to indigents accused of crime (see, 18 U.S.C. § 3006A(i)), the original compulsion for such appropriations came from the Court.

the Court's constitutional authority to enforce Bill of Rights guarantees. The argument must be rejected.

b. FDIC argues that a second factor counselling hesitation is the discretionary function exception to the FTCA which was meant to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." FDIC Br. 26-7, quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984). FDIC's argument that the discretionary function exception counsels hesitation must fail for two reasons. First, Meyer's claim is based not upon allegations of common law tort, but, rather, on the distinctly different theory of constitutional torts outlined in *Bivens*. Therefore, the discretionary function exception is completely irrelevant to this action. Second, and even more fundamentally, Meyer does not dispute FSLIC's authority to terminate him, nor does he claim the right to "second-guess" its administrative decisions where they were grounded upon social, economic or political policy. Rather, Meyer's claim is based upon FSLIC's failure to provide due process in the execution of those decisions.

FDIC persists in the circular argument that because Meyer claims a tort, his action is boot-strapped into the confines of the FTCA. The argument ignores the nature of Meyer's claim – that is, a *constitutional* tort as compared to a common law tort – and the accepted distinction between common law torts, which are subject to the remedies and limitations of the FTCA, and constitutional torts which are not. As explained below, at pp. 31 to 32, the distinction between common law torts and constitutional torts has been recognized by this Court, by Congress, and by the Department of Justice. The discretionary immunity of the FTCA, found at 28 U.S.C. § 2680(a), is simply inapplicable to Meyer's action.

Moreover, while FSLIC could claim immunity for discretionary, as compared to mandatory, acts under the

FTCA – a distinction that is often difficult to draw (See, eg., *United States v. Gaubert*, 499 U.S. ___, 113 L. Ed. 2d 335 (1991)) – FSLIC had no "discretion to violate the Federal Constitution" since "its dictates are absolute and imperative." *Owen v. City of Independence*, 445 U.S. 622, 649 (1980). The rationale for discretionary immunity, that is, the avoidance of judicial second-guessing of legislative or administrative acts, is incompatible with the concept of constitutional torts. A governmental entity has no discretion to violate the Constitution and when a federal court enters judgment based upon a constitutional violation it does not second-guess any governmental decision nor seek to interfere with any competing policy considerations. Rather, through judgment the court merely enforces the absolute and imperative requirements of the Constitution. *Id.* at 649.

c. Finally, FDIC argues that a special factor counselling hesitation is the existence of an "elaborate remedial mechanism fashioned by Congress". FDIC Br. 28. Had Congress fashioned an alternative remedy explicitly declared to be a substitute for recovery under the Constitution and viewed as being equally effective, principles of discretion and comity may have required the Court to stay its hand, even if the Congressional scheme offered imperfect relief. See, eg., *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988). With respect to the claims asserted by Meyer, however, Congress has not created an equally effective alternative remedy – or, indeed, any remedy at all – let alone, an "elaborate remedial mechanism". Meyer's *Bivens*-type claim is his only remedy and was properly authorized by the court of appeals.[7]

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[7] Any judicially-created constitutional tort or *Bivens*-type remedy could be supplanted by a Congressionally-created remedy aimed at vindicating the violation of constitutional rights. Thus, *Bivens* and its progeny, including this case, can be viewed as temporary remedial acts which "open * * * a dialogue with Congress" over the most appropriate way to protect individual

Those remedial mechanisms fashioned by Congress which have been found to be sufficiently elaborate to counsel hesitation include the comprehensive scheme regulating military life (*Chappell v. Wallace*, 462 U.S. 296 (1983) and *United States v. Stanley*, 483 U.S. 669 (1987)); the extensive system of rules for federal employment (*Bush v. Lucas*, 462 U.S. 367 (1983)); and the administrative structure and procedures dealing with social security which "are of a size and extent difficult to comprehend" (*Schweiker v. Chilicky*, supra, 487 U.S. at 424, citing *Richardson v. Perales*, 402 U.S. 389, 399 (1971)). In each of these cases considerable, if not fully exhaustive, alternative remedies had been provided for persons claiming constitutional violations:

> In sum, the concept of 'special factors counselling hesitation in the absence of affirmative action by Congress' has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional Bivens remedies.

Schweiker, supra, 487 U.S. at 423.

No such mechanisms for remediation of constitutional violations were provided in the statutory or regulatory scheme under which Fidelity was seized and Meyer terminated. With surprisingly expansive rhetoric, FDIC argues that Meyer's claim "arises at the intersection of several different remedial schemes." FDIC Br. 28. What is left unsaid is that none of these alleged remedies provide any relief to Meyer, or anyone else in his circumstance,

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constitutional rights. Monaghan, *The Supreme Court, 1974 Term – Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 30 (1975).

and none is a mechanism created by Congress to redress constitutional violations that may occur in the course of administration of banking regulation programs. The "intersection" of supposed remedies is in fact limited to two: (1) the FTCA, which FDIC itself contends would offer no relief for Meyer's claims (FDIC Br. 26-8), and (2) Meyer's alleged right to submit a claim for a contract violation which, as explained below at pp. 44 to 47, is a wholly illusory remedy. Neither of these remedies is calculated to redress constitutional violations, and their existence hardly suggests "that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that might occur in the course of" FSLIC's administration of the federal banking laws. *Schweiker*, supra, 487 U.S. at 423. It is precisely such a circumstance, when constitutional deprivations would not otherwise be vindicated, that led the Court in *Bivens* to initially imply a judicial remedy directly under the Constitution. And here, the Court should affirm such a remedy directly against a sue-and-be-sued agency for which, as explained immediately below, sovereign immunity has been waived.

B. Sovereign Immunity From Meyer's Claim Was Waived By Congress In The Organic Legislation Creating FSLIC And Because Meyer's Claim Is Not Cognizable Under The Federal Tort Claims Act, It Is Not Barred Or Restricted By FTCA Limitations On Recovery.

The court of appeals' authorization of a *Bivens*-type suit against FSLIC directly does not violate the doctrine of sovereign immunity because sovereign immunity from such claims was waived when Congress created the agency and gave it the authority to sue-and-be-sued.

Such sue-and-be-sued clauses are broadly construed as general waivers of sovereign immunity.[8]

[8] A number of thoughtful writers have commented on the tension between *Bivens* claims and the doctrine of sovereign immunity. See, Note, *Rethinking Sovereign Immunity After* Bivens, supra, 57 N.Y.U. L. Rev. 597; Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532 (1972); Comment, *Sovereign Immunity – An Anathema to the "Constitutional Tort,"* 12 Santa Clara Law. 543 (1972). Given the nature of the doctrine of sovereign immunity, and the underpinnings of our constitutional democracy, compelling logic should lead the Court to authorize Meyer's claim, regardless of whether there has been a Congressional waiver.

As developed at common law, the doctrine of sovereign immunity was based upon the structure of the feudal system which placed the King at a place of higher authority than any other lord. The sovereign's immunity rested on this structure and on a fiction that the King could do no wrong. *Nevada v. Hall*, 440 U.S. 410, 414-15 (1979). The fiction was rejected by the colonists in the Declaration of Independence. *Id.* at 415.

The doctrine of sovereign immunity is not constitutionally compelled. *Id.* at 428 (Blackmun, J., dissenting) [pointing to majority conclusion that "the sovereign-immunity doctrine has no *constitutional* source"]; *Edelman v. Jordan*, 415 U.S. 651, 687 (1974) (Brennan, J., dissenting); *Employees v. Department of Pub. Health & Welfare*, 411 U.S. 279, 288 (1973) (Marshall, J., concurring). The modern rationale for the doctrine of sovereign immunity is "the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Nevada v. Hall*, supra, 440 U.S. at 416, quoting *Kawananakoa v. Polybank*, 205 U.S. 349, 353 (1907). While this justification may be appropriate for those rights created by Congress – where Congress is "the authority that makes the law on which the right depends"(*Id.*) – the rationale is clearly inapposite where the right being sued upon is found in the Constitution itself.

Meyer's claim is based upon a constitutional – rather than common law – tort. Constitutional torts are separate and distinct from the common law of torts and are not cognizable under the FTCA.

The source of substantive law upon which Meyer grounds his claim is the Due Process Clause of the Fifth Amendment as construed by the Court in *Bivens*. As that source is defined in *Bivens*, it "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States v. Mitchell*, supra, 463 U.S. at 218.

1. The organic legislation creating FSLIC included 12 U.S.C. § 1725(c) (as in effect in 1982) which provided in pertinent part:

> On June 27, 1934, the [Federal Savings and Loan Insurance] Corporation shall become a body

Article III courts possess the "power – and therefore the duty – to make principled choices among traditional judicial remedies" to redress or prevent constitutional violations. *Bivens v. Six Unknown Named Agents*, supra, 403 U.S. at 408, n.8 (Harlan, J., concurring). It would be more than a little ironic for our nation – which was founded on a declaration decrying despotic acts of a sovereign – were the Court to hold that individual rights guaranteed by the Constitution could never be enforced against any government entity because of sovereign immunity. Rather, even in the absence of a waiver of sovereign immunity, "[i]f it can be shown that the government is liable for a violation of the Constitution, the logic that led the Court to conclude in *Bivens* that a damage remedy against a federal officer is within the 'judicial power' should lead to the conclusion that a similar remedy is available against the government * * * . The federal government, no less than a federal officer, is bound by the Constitution. Just as the Court may hold a federal officer liable in damages in a *Bivens*-type action, the Court may hold the federal government liable for damages for its constitutional violations." Note, *Rethinking Sovereign Immunity After* Bivens, supra, 57 N.Y.U. L. Rev. at 624-6.

> corporate, and shall be an instrumentality of the United States, and as such shall have power –
>
> * * *
>
> (4) To sue and be sued, complain and defend, in any court of competent jurisdiction in the United States * * * .

Sue-and-be-sued clauses are to be construed as general waivers of sovereign immunity unless (1) the suit in question is "not consistent with the statutory or constitutional scheme," (2) "an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function," or (3) "for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense." *Loeffler v. Frank*, 486 U.S. 549, 554 (1988); *Federal Housing Administration v. Burr*, 309 U.S. 242, 245 (1940). There is no reason why the sue-and-be-sued language in 12 U.S.C. § 1725(c)(4) should be narrowly read in this case.

Meyer's claim for damages based on a constitutional deprivation is consonant with the "great outlines" of the Constitution and its "majestic simplicity" in designating individual rights and identifying the judiciary as the primary means through which they are to be enforced. *Davis v. Passman*, supra, 442 U.S. at 241. And Meyer's action is not inconsistent with the statutory scheme of Congress in the FTCA. As explained below, pp. 31 to 33, Congress and the Court view constitutional torts as independent from and parallel to common law torts.

The implication of a *Bivens* remedy against FSLIC directly would not amount to a "grave interference with the performance of a governmental function." *Federal Housing Administration v. Burr*, supra, 309 U.S. at 245. The process due Meyer was minimal, "*some* kind of notice and * * * *some* kind of hearing," those "rudimentary precautions" which the Due Process Clause guarantees. *Goss v. Lopez*, 419 U.S. 565, 579, 581 (1975). See also, *Board of Regents v. Roth*, 408 U.S. 564, 569, n.7 (1972); *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971).[9]

Finally, there is no reason to conclude that the purpose of Congress was to use the sue-and-be-sued clause in a narrow sense which would exclude claims for constitutional violations. It is true that "in the context of suits for which [Congress] provided a cause of action under the FTCA, 'sue-and-be-sued' agencies would be subject to suit only to the same limited extent as agencies whose sovereign immunity from tort suits was being waived for the first time". *Loeffler v. Frank*, supra, 486 U.S. at 562. However, as the court of appeals correctly notes, inquiry into the Congressional intent to put sue-and-be-sued agencies on equal footing with other federal agencies for purposes of the FTCA begs the " * * * very question raised by this case, namely whether constitutional torts are torts for which Congress 'provided a cause of action under the FTCA' ". Pet. 18a. The critical question is how Congress dealt with the interplay of sue-and-be-sued clauses and the FTCA. As explained at more length immediately below, Congress has provided that FTCA remedies are exclusive *only* for those claims that are *cognizable* under the act. Since constitutional torts are not cognizable under the act no Congressional intent to exclude *Bivens* claims against sue-and-be-sued agencies can be implied.

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[9] Four individuals were terminated by FSLIC at the time of the Fidelity seizure. Providing rudimentary procedural due process to those four persons would not have resulted in a grave interference with the functioning of the FSLIC, especially given the availability of suspension with pay as a method to protect the interests of the government as well as the persons being terminated. (See below at pp. 43 to 44) If deemed prudent, the use of suspension with pay could have permitted individual termination decisions to be made over a number of days or weeks, and not immediately at the time of the seizure.

2. FDIC notes that Congress has specifically provided for the interplay between sue-and-be-sued clauses and the FTCA at 28 U.S.C. § 2679(a) which provides: "[t]he authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under 28 U.S.C. § 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive."

As pointed out by FDIC, 28 U.S.C. § 1346(b) is the "principal provision" of the FTCA. FDIC Br. 13, citing *Smith v. United States*, 113 S. Ct. 1178, 1181 (1993). Section 1346(b) defines "negligent or wrongful act or omission", for purposes of the FTCA, in a manner that includes common law torts but excludes constitutional torts:

> Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, *under circumstances where the United States, if a private person, would be liable to claimant in accordance with the law of the place where the act or omission occurred.* [emphasis added]

The court of appeals' recognized that constitutional torts are implicitly excluded from Section 1346(b) because they are not based upon conduct which would make a private person liable to the claimant in accordance with the law of the place where the act or omission occurred. Pet. 10a. "Because 'the constitutional tort is a child of federal law, the United States is not liable for such torts under the Federal Tort Claims Act.' " Pet. 10a, quoting from Bell, *Proposed Amendment to the Federal Tort Claims Act*, 16 Harv. J. on Legis. 1, 4 (1979).

The court of appeals finding that constitutional torts are separate from common law torts, and thus not cognizable under the FTCA, is consistent with opinions by this Court, with expressed Congressional intent and with positions taken previously by the Department of Justice. The Court has observed that the common law of torts and *Bivens* create separate and distinct causes of action which are "parallel" and "complimentary." *Carlson v. Green*, supra, 446 U.S. at 20. The Court has specifically held that the FTCA was never meant to supplant constitutional torts. "[N]othing in the [FTCA] or its legislative history [shows] that Congress meant to preempt a *Bivens* remedy or to create an equally effective remedy for constitutional violations." *Id.* at 19.

Congressional intent, as gleaned from the legislative history of the Federal Employees Liability Reform and Tort Compensation Act of 1988, while not entirely enlightening, at the very least shows a Congressional understanding of the distinction between common law torts and *Bivens* or constitutional claims. As quoted by the court of appeals, the House Committee Report on that legislation provides, in part, as follows:

> [T]he term "common law tort" embraces not only those state law causes of action predicated on the "common" or case law of the various states, but also encompasses traditional tort causes of action codified in state statutes that permit recovery for acts of negligence * * * . It is well established that the FTCA applies to such codified torts * * * . *A constitutional tort action, on the other hand*, is a vehicle by which an individual may redress an alleged violation of one or more fundamental rights embraced in the Constitution.

H.R. Rep. No. 100-700, p. 6 (1988) (emphasis added) Pet. 19a, n.16.

The distinction between common law torts and constitutional torts eventually embraced in the House Committee Report came, at least in part, from testimony provided by the Department of Justice.[10] House Hearings on H.R. 4358, H.R. 3872, and H.R. 3083, 100th Congress, Second Session 78 (April 14, 1988); See, also, *United States v. Smith,* supra, 111 S. Ct. 1180, 113 L. Ed. 2d 134, 154 (1991) (Stevens, J., dissenting).

Despite the general recognition of Congress, this Court, and the Department of Justice, that common law torts and constitutional torts are separate and distinct, FDIC boot-straps an argument that since "all claims sounding in tort are 'cognizable' under the FTCA", Meyer's constitutional tort claim must also be thusly cognizable. FDIC Br. 14. FDIC's argument, like all circular arguments, falls apart, however, when the underlying premise is shown to be untrue. It is not true, that "all

[10] While the Department did not address the exact question involved in this case, that is, the waiver of sovereign immunity from constitutional torts by a sue-and-be-sued clause, in House testimony given by Robert L. Willmore, Deputy Assistant Attorney General, supporting the 1988 legislation, the following was said regarding the distinction between common law and constitutional torts: "It also is important to emphasize that [the 1988 Act] would apply only to cases alleging injury caused by ordinary common law tortious conduct. By common law tortious conduct, we mean not just causes of action based upon the 'common' or case law of the several states, but also causes of action codified in state statutes that permit recovery for negligence, such as, for example, wrongful death statutes. The term does not include, and [the proposed legislation] is not intended to apply to, cases that allege violations of constitutional rights, or what commonly are known as *Bivens* cases. Persons alleging constitutional torts will, under [the proposed legislation], remain free to pursue a remedy against the individual employee if they so choose." House Hearings on H.R. 4358, H.R. 3872, and H.R. 3083, 100th Congress, Second Session 78 (April 14, 1988).

claims sounding in tort are 'cognizable' under FTCA". *Id.* Only those wrongs for which a private person would be liable under local law are cognizable under the FTCA. 28 U.S.C. § 1346(b). Constitutional wrongs clearly do not fit within this definition. Pet.App. 10a.

FDIC points out that under *United States v. Smith,* supra, claims sounding in tort, even where barred by an FTCA exclusion, are nevertheless "cognizable" under the act. FDIC Br. 15-16. Meyer does not dispute this proposition but it is inapposite because the wrong involved in *Smith* was clearly a common law tort. Likewise, *Smith v. United States,* 113 S. Ct. 1178 (1993); *Laird v. Nelms,* 406 U.S. 797 (1972); *Hatahley v. United States,* 351 U.S. 173 (1956); *Dalehite v. United States,* 346 U.S. 15 (1953); *Hubsch v. United States,* 338 U.S. 440 (1949); which FDIC uses in various ways to advance its arguments respecting the applicability of FTCA and excluded wrongs, all deal with common law torts rather than constitutional torts or *Bivens* claims. None of these cases are determinative of the issues presented in this case.

The analysis by the court of appeals was correct. Constitutional tort claims are "implicitly" excluded from the FTCA and are not cognizable under it. Pet. 9a-11a.

3. Relying on *United States v. Testan,* 424 U.S. 392 (1976) and *United States v. Hopkins,* 427 U.S. 123 (1976) (per curiam), FDIC argues that even if Congress did waive sovereign immunity, Meyer cannot recover because he does not base his claim on substantive law "mandating compensation". FDIC Br. 23-4. FDIC is incorrect. Meyer bases his claim on his constitutional right to due process which the Court found, in *Bivens,* to be a natural predicate for money damages. Meyer's constitutional right thus mandates compensation in a manner similar to that outlined by the Court in *United States v. Mitchell,* supra, 463 U.S. 206.

FDIC's reliance on *United States v. Hopkins*, is misplaced because the brief discussion of a proposed constitutional theory in that per curiam decision is dicta. *Id.* at 130.

The *Testan* rule, that is, that a plaintiff suing the government must show both a waiver of sovereign immunity and a substantive right "mandating" compensation (*Testan*, supra, 424 U.S. at 402), was more recently examined and applied in circumstances similar to this case in *United States v. Mitchell*, supra, 463 U.S. 206 (1983) ("*Mitchell II*"). In *Mitchell II*, the Court based a finding of substantive law mandating compensation on the General Allotment Act of 1887 (25 U.S.C. §§ 331 et seq.), plus additional statutes and regulations which gave the government "full responsibility to manage Indian resources" and established a fiduciary relationship between the United States and Indian allottees. *Mitchell II*, supra, 463 U.S. at 224. Together, the statutes and regulations did not themselves mandate money damages; at most they created a "nonmonetary duty". *Id.* at 232 (Powell, J., dissenting). Nevertheless, these statutes and regulations, when viewed in conjunction with the common law of fiduciary relationships, were sufficient to create substantive law mandating compensation for purposes of a *Testan* analysis:

> Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained.

Mitchell II, supra, 463 U.S. at 226.

Similarly, here, as established by the straight-forward logic of *Bivens*, the Constitution provides an imperative that constitutional torts be vindicated by the judiciary and that damages be utilized as the historic and conventional remedy by which this should be accomplished. Here, as in *Mitchell II*, the Constitution can be – indeed, in *Bivens*, has been – fairly interpreted as mandating compensation for the injury sustained by Meyer.

II. MEYER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS WAS VIOLATED WHEN HE WAS DISMISSED WITHOUT ANY FORM OF NOTICE OR OPPORTUNITY TO BE HEARD.

Even where circumstances call for urgent government action, the Constitution's requirement of "*some* kind of notice and * * * *some* kind of hearing" – "rudimentary precautions" (*Goss v. Lopez*, supra, 419 U.S. 565) – must be afforded before protected property interests are taken. The authority given to FSLIC to set aside burdensome contracts reflected the urgency of the circumstances when a savings and loan association was found to be threatened by financial difficulties. However, as noted by the court of appeals, "the weight of the federal interest goes to the question of *what*, not *whether*, process is due" persons impacted by the seizure and subsequent actions taken. Pet. 27a.

A. Meyer Had A Legitimate Claim Of Entitlement To Continued Employment, Based Upon An Employment Contract Implied Under State Law, Which Created A Constitutionally-Protected Property Interest.

1. Meyer's right to due process was dependent on whether his employment relationship had achieved the status of a constitutionally-protected property right. Property interests are not created by the Constitution. Rather, "they are created and their dimensions are defined by existing rules or understandings that stem

from an independent source such as state law * * * ." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); See, also; *Cleveland Bd. of Educ. v. Loudermill*, supra, 470 U.S. 532; *Perry v. Sindermann*, 408 U.S. 593 (1972). Reference to such independent sources will determine whether a claim to continued employment is based upon "a legitimate claim of entitlement", creating a protected property interest, or results merely from "an abstract need or desire" or a "unilateral expectation." *Board of Regents v. Roth*, supra, 408 U.S. at 577. Where only a need, desire or unilateral expectation exists, no constitutionally-protected property interest is created.

The court of appeals was correct in affirming the jury finding that based on California law[11], and the history of Meyer's employment, Meyer had a legitimate claim of entitlement to continued employment absent just cause for dismissal. Indeed, FDIC acknowledges that "California law may have given [Meyer] an enforceable contractual right to continued employment * * * ." FDIC Br. 30. Contrary to FDIC's arguments, this property interest was not inconsistent with – or contrary to – federal banking law in effect at the time of Meyer's dismissal.

2. While federal banking statutes and regulations in effect in 1982 set standards applicable to employment contracts for personnel of insured institutions (See, (12 C.F.R. § 563.39 (in effect on April 13, 1982)), these standards did not prohibit an employment arrangement, such as Meyer's implied contract, which permitted termination only for cause . Further, while FSLIC was granted authority to seize and manage troubled savings and loans, and

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[11] See, *Cleary v. American Airlines, Inc.*, 168 Cal. Rptr. 722 (Cal. App. 1980); *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917 (Cal. App. 1981); and *Foley v. Interactive Data Corp.*, 765 P. 2d 373 (Cal. 1988).

to repudiate contracts determined to be "burdensome" (12 C.F.R. § 569a.6(c)(3)(in effect on April 13, 1982)), FSLIC's prerogative cannot be construed to have been so unfettered as to have sanctioned conduct violative of constitutional entitlements. Meyer's state entitlement did not cease to exist at the moment of the regulatory seizure. Rather, it was *subject* to rejection, when and if found burdensome, and due process protections were required in the process leading to such a finding.

Nothing in federal banking laws prohibited Meyer's employment contract prior to the seizure of Fidelity. At that time, 12 C.F.R. § 563.39 provided as follows with respect to employment contracts:

> An insured institution shall not enter into an employment contract with any of its officers or other employees if such contract would constitute an unsafe or unsound practice * * * [T]he making of such an employment contract would be an unsafe or unsound practice if such contract could lead to material financial loss or damage to the insured institution or could materially interfere with the exercise by the members of its board of directors of their duty or discretion as provided by law, charter, bylaw or regulation as to the employment of an officer or employee of the institution. This may occur, depending upon the circumstances of the case, where an employment contract provides for an excessive term, or does not contain an appropriate termination for cause provision.

California law, on which Meyer bases his property right entitlement, is consistent with this regulation and closely parallels its language and intent. Where the circumstances of employment create an implied contract between employee and employer, California law contemplates that termination will be for-cause only. (*Pugh v.*

See's Candies, Inc., supra, 171 Cal. Rptr. 917; *Foley v. Interactive Data Corp.*, supra, 765 P. 2d 387-388). However, just as Section 563.39 reflects a concern that appropriate managerial discretion be reserved for savings and loan employers, so does California law:

> Essentially, [the terms "just cause" and "good cause" for dismissal] connote a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power * * * Care must be taken, however, not to interfere with the legitimate exercise of managerial discretion."

Pugh, supra, 171 Cal. Rptr. at 928 (internal quotation marks and citations omitted).

FDIC's suggestion that "standard preemption principles" (FDIC Br. 32) would bar the application of California law on implied employment contracts is simply wrong. The federal regulations did not conflict with California law and both could co-exist. The court of appeals was correct in agreeing with Meyer that "it is perfectly plausible that a contract [implied under California law] contemplating dismissal only for good cause would not 'constitute an unsafe or unsound practice' under 12 C.F.R. § 563.39." Pet. 25a.[12]

[12] FDIC chose not to develop its preemption argument with any meaningful detail. In brief, however, Meyer's claim has not been preempted under either the implied or the express prong of the preemption doctrine.

Federal preemption of state law, of course, has its basis in the Supremacy Clause of the Constitution (Art. VI, cl. 2). It turns, ultimately, on the intent of Congress which may be explicitly stated in a statute or implicitly contained in the structure and purpose of the legislation. *Cipollone v. The Liggett Group, Inc.*, 505 U.S. ___, 112 S. Ct. 2608, 120 L. Ed. 407 (1992). In the absence of an express congressional statement of preemption,

FDIC does not argue, and the law would not support an assertion, that contracts such as Meyer's ceased to exist *ab initio* on the occurrence of the Fidelity seizure. Rather, with the seizure, FSLIC was granted the power to " * * * [r]eject or repudiate any lease or contract which it consider[ed] burdensome". 12 C.F.R. § 569a.6(c)(3)(in effect on April 13, 1982). And while FDIC seeks a license to operate with unfettered discretion in exercising this power, the Court has implied safeguards where, as here, governmental action results in deprivation of constitutionally-protected interests.[13]

Where Congressional legislation or Executive directives authorize deprivations of liberty or property they must ordinarily provide for due process and when they are silent the Court has implied a right of impacted individuals to notice and a meaningful opportunity to be heard. *Burns v. United States*, 501 U.S. ___, 111 S. Ct. 2182,

state law is preempted if there is an actual conflict or if federal law so occupies a field as to leave no room for the states to supplement it. *Id.*

FDIC does not appear to argue that express preemption should bar Meyer's claim. No express preemption language is noted by FDIC or has been found by Meyer. Nor is Meyer's' claim diminished by implied preemption because California law and 12 C.F.R. § 563.39 are consistent and parallel,rather than being in conflict, and there is room for both to co-exist. Meyer's claims are not barred by preemption.

[13] FDIC asks the court to sanction a grant of "unreviewable authority to employ personnel as it deems appropriate and to repudiate executory contracts in its sole discretion". FDIC Br. 32. Presumably, such unreviewable prerogative would allow federal regulators to literally do anything they desired in repudiating contracts, no matter how arbitrary, and would, for instance, allow decisions based on race, age or gender. The Court should be careful to avoid sanctioning procedures which could result in such unreviewable lawlessness by government agencies.

115 L. Ed. 2d 123, 132-3 (1991); *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *The Japanese Immigrant Case*, 189 U.S. 86 (1903). Due process requires that deprivations of protected interests be accompanied by those safeguards essential to procedural fairness. *Id.*, citing *Kent v. United States*, 383 U.S. 541, 557 (1966) [right to adversary representation in juvenile transfer proceedings]; *Greene v. McElroy*, 360 U.S. 474, 495-508 (1959) [right to confront adverse witnesses in security clearance revocation hearing]; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-51 (1950) [right to formal hearing in deportation proceedings]. Meyer does not dispute that FSLIC had the right to terminate him upon determining that his employment contract was burdensome. However, FSLIC's broad discretion was not completely unfettered. Meyer was entitled to due process, including notice and a reasonable opportunity to be heard.[14]

[14] FDIC claims confusion as to the issue which would have been presented to the decision maker at Meyer's hearing. FDIC Br. 32, n.26. The issue would have been whether Meyer's implied employment contract was "burdensome". Had he been given the opportunity at a fair hearing, Meyer would have explained that he was in charge of branch operations, and was not involved with Fidelity's loan policies which had allegedly led to its financial difficulties. J.A. 72-3. He would have had the opportunity to show that he was an asset to the savings and loan entity and how he could have helped it function, especially in the administration of its extensive branch system, in the difficult period to follow while the institution was shepherded through the purchase and assumption transactions. While the receiver could have rejected Meyer's position and repudiated the contract despite what Meyer said (in which case, this lawsuit would not have resulted), the essence of due process entitled Meyer to "some kind of hearing" before deprivation of his property right in continued employment. *Cleveland Bd. of Educ. v. Loudermill*, supra, 470 U.S. at 542.

3. FDIC argues that its "broad statutory mandate" to "do all things desirable or expedient * * * to carry on the business of [the failed] institution" gave it the power to terminate employees at will and thus vitiated Meyer's substantive property right. FDIC Br. 29-36. This argument is inconsistent with the distinction noted by the Court between the substance of a property interest in continued employment and the procedure used to terminate employment. *Cleveland Bd. of Educ. v. Loudermill*, supra, 470 U.S. at 541. A "bitter with the sweet" approach, where the scope of the employment right is defined by the procedure used in terminating it has been rejected. *Id.* Once a protected property interest in employment has been created, the interest can be destroyed by the government only in a manner that comports with due process; that is, only where the taking allows for appropriate procedural safeguards. The substantive right cannot be limited by the procedure through which deprivation is allowed to occur.

FDIC's reliance on *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) is misplaced. In that case relevant regulations did limit the effect of an agreement not reflected in an institution's records, so that the agreement could not be used as a defense to payment on a note. Here, by contrast, Meyer's contract would only have been limited if it had been found to be an unsafe or unsound practice. FSLIC never determined that Meyer's contract amounted to an unsafe or unsound practice and it is unlikely that any such finding could have been made.

B. Meyer Was Entitled To A Hearing Prior To His Termination. No Adequate Post-Termination Remedies Were Available To Vindicate The Deprivation Of Meyer's Protected Property Interest.

Meyer was entitled to a pre-termination hearing. Any reasonable concern by FSLIC that keeping him on the job pending such a hearing presented a risk could have been resolved by the simple expediency of suspension with pay. The post-deprivation contract remedies allegedly available to Meyer were only illusory, at best.

1. Once it is established that the Due Process Clause applies, "the question remains what process is due". *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In employment cases, due process does not generally require an extensive or prolonged hearing. Rather, all that is required is notice and an opportunity to present reasons, in person or in writing, why the proposed action should not be taken. *Cleveland Bd. of Educ. v. Loudermill*, supra, 470 U.S. at 546; See, also, Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975). Meyer was entitled to know why he was being terminated and to the "opportunity to present his side of the story." *Cleveland Bd. of Educ. v. Loudermill*, supra, 470 U.S. at 546. However, while the hearing need not be elaborate, the Court has made clear that except in the most extreme cases, due process requires a hearing *prior to* the deprivation; "the root requirement of the Due Process Clause [is] that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest". *Id.* at 542, quoting, *Boddie v. Connecticut* , 401 U.S. 371, 379 (1971) (internal quotation marks omitted) (emphasis in original); See also, *Board of Regents v. Roth* , supra, 408 U.S. at 577; *Perry v. Sindermann*, supra, 408 U.S. 593.

FDIC's assertion that Meyer was not entitled to a pre-termination hearing (FDIC Br. 37-40) is not supported by law or by the facts of this case. Ignoring the Court's unambiguous requirement of pre-termination hearings in employment cases (See, *Cleveland Bd. of Educ. v. Loudermill*, supra, 470 U.S. at 542), FDIC turns to *Hudson v. Palmer*, 468 U.S. 517 (1984) and *Parratt v. Taylor*, 451 U.S. 527 (1981) which involve seizure of property from incarcerated prisoners. The Court established, in this distinctly different circumstance, that a hearing after a property interest deprivation can satisfy due process where either (1) the necessity for quick action or (2) the impracticality of providing any meaningful pre-deprivation process, is coupled with (3) the availability of some meaningful process by which to assess the propriety of government action after the initial taking. None of these three characteristics were present to justify deferral of a hearing in Meyer's case until after he was terminated from employment.

While FDIC refers in general terms to the necessity for prompt action whenever "a banking institution is threatened with failure" (FDIC Br. 37), there is no showing in the record that any regulatory actions with respect to Fidelity, except the initial seizure, occurred in a rapid or accelerated fashion. Indeed, the purchase and assumption transaction was not completed until September 28, 1982, nearly six months after the seizure, when FSLIC transferred the assets and liabilities of Fidelity to its new owner, Citicorp Bank. J.A. 64. If FSLIC was concerned that a "significant hazard" resulted from Meyer's continued employment for any period after the seizure, the simple expediency of suspension with pay could have been used to preserve Meyer's right to a hearing while also protecting FSLIC's interest in promptly assuming

management of the institution. *Cleveland Bd. of Educ. v. Loudermill*, supra, 470 U.S. at 544-45.[15]

No necessity for quick action or practical considerations diminished Meyer's right to a meaningful predeprivation hearing, subject, possibly, to a period of suspension with pay.

2. Meyer's interest in continued employment was substantial and even if the post-termination contract remedies suggested by FDIC were not illusory, the damage had been done once the termination took place:

> [T]he significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. * * * While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.

Cleveland Bd. of Educ. v. Loudermill, supra, 470 U.S. at 543. The stigma attached to Meyer's termination was exacerbated by the fact that it occurred during a regulatory take-over by the government, leaving the impression on any prospective employer that Meyer must have engaged in some kind of wrong-doing. Given his work experience, Meyer was left after termination with little option but to seek employment in the banking or savings and loan fields. But employers in those highly-regulated industries

[15] The Court in *FDIC v. Mallen*, 486 U.S. 230 (1988), considered the right to a hearing in just such a circumstance. There, the thrift officer had been suspended and was later afforded a post-suspension hearing, the adequacy of which was the subject of the Court's opinion. Because of the obvious difference between these facts and Meyer's circumstances, involving termination rather than suspension, FDIC's reliance on the case is misplaced. (FDIC Br. 38-9).

would be very cautious about hiring a person who had previously been terminated by federal regulators.

FDIC disingenuously suggests that Meyer had two distinct post-termination remedies, presenting a claim with or filing a lawsuit against the estate of Fidelity for breach of contract. FDIC Br. 40-43.

The actions contemplated are variously described as "a claim with the receiver for the value of any contractual rights he believes to have been violated" (FDIC Br. 40) and "a claim in federal court against the receiver for breach of contract" (FDIC Br. 42). In either case, the putative contract remedies are based generally on *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561 (1989). An analysis of that case demonstrates why the supposed remedies are illusory at best.

Coit dealt with the question of how an existing lawsuit, claiming pre-seizure wrongful conduct by a failed savings and loan, was to be handled after the FSLIC became receiver for the association. In that context the receiver steps into the shoes of the failed association. Claims for pre-seizure wrongs are satisfied out of available assets of the seized entity, to the extent that they exist. *Id.* at 571. *Coit* stands for the proposition that FSLIC is not empowered to adjudicate the pre-existing claim, and that the plaintiffs were entitled to a de novo consideration in federal court. *Id.* at 564. *Coit* is distinguishable and its holding is not helpful to the issues raised by Meyer's claim.

As compared to the plaintiff in *Coit*, Meyer does not have a claim based on wrongful conduct *by the association*. Meyer had an employment contract with Fidelity Savings, but Fidelity did not terminate Meyer. He was, instead, terminated by FSLIC. FDIC suggests that Meyer throw it into the briar patch of a contract claim because Meyer cannot prevail on such a claim. If Meyer had

presented a claim or sued FSLIC as receiver for breach of contract, his claim would have been denied, and then defended on the basis that FSLIC didn't breach any contract and, indeed, had discretion to "[r]eject or repudiate any lease or contract which it consider[ed] burdensome". 12 C.F.R. § 569a.6(c)(3)(in effect on April 13, 1982). On the other hand, if the claim now contemplated by FDIC had been based on the conduct of Fidelity, the former employer, a complete defense would have resulted from the fact that Fidelity did not terminate Meyer's employment.[16]

In the final analysis, FDIC does not understand, or refuses to acknowledge, the basis of Meyer's claim. Meyer's claim is not one for breach of contract and Meyer does not claim that his implied employment contract could not have been rejected or repudiated by FSLIC, if it were found to be burdensome. Rather, Meyer's claim is one for damages due to a constitutional tort. Meyer was injured when he was denied due process in the procedure which led to the determination that his contract was burdensome and was to be rejected. The court of appeals understood and correctly affirmed the validity of Meyer's claim.[17]

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[16] In addition, *Coit* is quite clear in holding that such claims would be satisfied only to the extent that there are association assets available to do so. *Coit*, supra, 489 U.S. at 571-2. The record in this case fails to demonstrate that there were any assets left, after the transfer of most of the association's assets and liabilities to Citicorp (J.A. 74), with which Meyer could be compensated even if a contract claim could have been successfully brought.

[17] FDIC responds to the court of appeals by commenting that Meyer's right was not retrospectively annulled; rather it never existed in the first place because of "the right of the federal banking receiver to employ such personnel as it deems

The suggested contract claims are wholly illusory and authorization of damages directly under the Fifth Amendment is appropriate because otherwise the deprivation of Meyer's property interest by FSLIC will not be vindicated.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Counsel of Record For Respondent

June 1993

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appropriate or to repudiate executory contracts". FDIC Br. 34. This, again, begs the question involved in this case; that is, whether the receiver had to comport with due process in exercising its discretion to repudiate Meyer's contract if the contract were deemed burdensome.

APPENDIX A

STATUTORY PROVISIONS

1. 12 U.S.C. 1725(c) (In Effect on April 13, 1982) provides:

The [Federal Savings and Loan Insurance] Corporation shall become a body corporate, and shall be an instrumentality of the United States, and as such shall have power –

* * *

(4) To sue and be sued, complain and defend, in any court of competent jurisdiction in the United States or its Territories or possessions or the Commonwealth of Puerto Rico, and may be served by serving a copy of process on any of its agents or any agent of the Federal Home Loan Bank Board and mailing a copy of such process by registered mail or by certified mail to the Corporation at Washington, District of Columbia.

* * *

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2. 31 U.S.C. 9103 provides:

(a) Each wholly owned Government corporation shall prepare and submit each year to the President a business-type budget in a way, and before a date, the President prescribes by regulation for the budget program.

(b) The budget program for each wholly owned Government corporation shall –

(1) contain estimates of the financial condition and operations of the corporation for the current and following fiscal years and the condition and results of operations in the last fiscal year;

(2) contain statements of financial condition, income and expense, and sources and use of money, an analysis of surplus or deficit, and additional statements and information to make known the financial condition and operations of the corporation, including estimates of operations by major activities, administrative expense, borrowings, the amount of United States Government capital that will be returned to the Treasury during the fiscal year, and appropriations needed to restore capital impairments; and

(3) provide for emergencies and contingencies and otherwise be flexible so that the corporation may carry out its activities.

* * *

3. 31 U.S.C. 9104 provides:

(a) Congress shall –

(1) consider budget programs for wholly owned Government corporations the President submits;

(2) make necessary appropriations authorized by law;

(3) make corporate financial resources available for operating and administrative expenses;

* * *

(b) This section does not –

(1) prevent a wholly owned Government corporation from carrying out or financing its activities as authorized under another law;

* * *

(3) affect the authority of a wholly owned Government corporation to make a commitment without fiscal year limitation.

APPENDIX B

REGULATIONS

1. 12 C.F.R. 563.39 (In Effect on April 13, 1982) provides:

An insured institution shall not enter into an employment contract with any of its officers or other employees if such contract would constitute an unsafe or unsound practice. Section 545.25 – 1 of this chapter contains the requirements of the Board as to employment contracts by Federal savings and loan associations with their officers. The making of an employment contract by an insured institution other than a Federal association with any of its officers or employees will not be considered to be an unsafe or unsound practice merely for the reason that the contract varies from the requirements of section 545.25 – 1. However, the making of such an employment contract would be an unsafe or unsound practice if such contract could lead to material financial loss or damage to the insured institution or could materially interfere with the exercise by the members of its board of directors of their duty or discretion provided by law, charter, bylaw or regulation as to the employment or termination of employment of an officer or employee of the institution. This may occur, depending upon the circumstances of the case, where an employment contract provides for an excessive term or does not contain an appropriate termination for cause provision.

2. 12 C.F.R. 569a.6(c) (In Effect on April 13, 1982) provides:

* * *

(c) *Assets, claims and contracts.* The Receiver shall have power to:

(1) Sell for cash or on terms, exchange, or otherwise dispose of, in whole or in part, any or all of the assets and property of the institution, real, personal and mixed, tangible and intangible, of any nature, including any mortgage, deed of trust, chose in action, bond, note, contract, judgment, or decree, share or certificate of share of stock or debt, owing to such institution or the Receiver.

(2) Surrender, abandon, and release any choses in action, or other assets or property of any nature, whether the subject of pending litigation or not, and settle, compromise, modify, or release, for cash or other consideration, claims and demands in favor of the institution or the Receiver.

(3) Reject or repudiate any lease or contract which it considers burdensome * * *

(8)

No. 92-741

In the Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL DEPOSIT INSURANCE CORPORATION, PETITIONER

v.

JOHN H. MEYER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION

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TABLE OF AUTHORITIES

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1. It is undisputed that, if the sue-and-be-sued clause in the charter of the Federal Savings and Loan Insurance Corporation (FSLIC) did not waive sovereign immunity, this case cannot proceed. In our opening brief (Gov't Br. 11-23), we explain that the sue-and-be-sued clause in FSLIC's charter could not be construed to waive sovereign immunity for purposes of this case because such an interpretation is barred by 28 U.S.C. 2679(a). That provision states that a sue-and-be-sued clause does not waive sovereign immunity for claims—such as respondent's claims in this case—that are "cognizable" under the Federal Tort Claims Act (FTCA).

a. Respondent contends (Br. 30-33) that his claim avoids the bar of Section 2679(a) because it is not "cognizable" under the FTCA. His bases for that contention are unsound. It is true, as respondent states (Br. 31), that this Court has described common law torts and *Bivens* actions as "parallel" and "complementary," and has stated that Congress did not intend the FTCA "to pre-empt a *Bivens* remedy or to create an equally effective remedy for constitutional violations." *Carlson* v. *Green*, 446 U.S. 14, 19, 20 (1980). But that is because Congress recognized that *Bivens* remedies are available only against federal officials in their personal capacities. Respondent therefore merely states an obvious premise of this case—that the FTCA did not create a "remedy" for constitutional violations. As we explain in our opening brief (Gov't Br. 15-16 & n.13), however, the fact that the FTCA precludes recovery for a particular type of claim in no way suggests that tort claims generally (including constitutional tort claims) are not "cognizable" under the FTCA. See, *e.g.*, *United States* v. *Smith*, 111 S. Ct. 1180, 1185 (1991). The FTCA takes cognizance of the entire category of tort claims against the United States and specifies those for which a monetary remedy will be afforded. The purpose of Section 2679(a) is to ensure that the FTCA's requirements apply to all government agencies and instrumentalities, regardless of whether they are subject to a sue-and-be-sued clause.

Nor does the legislative history of the Federal Employees Liability Reform and Tort Compensation Act of 1988 cast any doubt on the conclusion that constitutional torts are "cognizable" under the FTCA. The legislative history of the 1988 Act, which did not amend Section 2679(a), cannot provide an authoritative interpretation of a term that Congress used when it enacted the FTCA 40 years earlier. See *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 63., 650 (1990). And in any event, the portions of the legislative history quoted by respondent (Br. 31-32)—which even he concedes are "not entirely enlightening" (Br. 31)—simply make the same point made by this Court in *Carlson*. As the passage quoted by respondent explains, the FTCA does not permit recovery on constitutional tort claims, and "[p]ersons alleging constitutional torts * * * remain free to pursue a remedy *against the individual employee* if they so choose." Br. 32 n.10 (quoting *Legislation to Amend the Federal Tort Claims Act: Hearing on H.R. 4358, H.R. 3872, and H.R. 3083 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 78 (1988) (emphasis added)). Nothing in the materials quoted by respondent remotely suggests that constitutional tort claims fall outside the bar in Section 2679(a) and may be brought directly against a federal agency for recovery of a money judgment. To the contrary, as we explain in our opening brief (Gov't Br. 22-23), the changes in Section 2679(b) actually made by the 1988 Act presuppose that constitutional tort claims *are* "cognizable" under the FTCA.

b. It does not advance respondent's cause simply to assert (Br. 33) that constitutional torts are distinct in some respects from common law torts. The sole basis on which the court of appeals held that constitutional tort claims are not "cognizable" under the FTCA was that they are excluded by the FTCA's basic waiver of sovereign immunity, 28 U.S.C. 1346(b), rather than by one of the FTCA's "express" exclusions. We explain in our opening brief (Gov't Br. 19-20) that Section 1346(b) excludes many other types of tort claims as well, including those based on strict liability, those based on actions by a federal employee outside the scope of his

employment, and those nonconstitutional tort claims in which a private person would not be liable under state law. Under the theory advanced by the court of appeals and by respondent, all of those claims would similarly be held not "cognizable" under the FTCA, and all of them could thus be brought directly against a sue-and-be-sued agency.[1] That would be inconsistent with Congress's determination that Section 2679(a) would "place torts of 'suable' agencies * * * upon precisely the same footing as torts of 'nonsuable' agencies," and it would lead to precisely the result that Congress sought to avoid, by making a sue-and-be-sued clause "the basis for suits for money recovery sounding in tort." H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945).

There is, in short, no principled basis for creating a loophole in Section 2679(a) just large enough for constitutional torts. Rather, if the reasoning of the court of appeals and of respondent is correct, a wide gap in FTCA "cognizability" is created for numerous varieties of constitutional and nonconstitutional torts. Sue-and-be-sued agencies—but not other agencies—could be sued for all of those torts, in direct contravention of the language and purposes of Section 2679(a). Respondent entirely

[1] Aside from the FTCA's "explicit" exceptions in 28 U.S.C. 2680 and its "implicit" exceptions in 28 U.S.C. 1346(b), FTCA plaintiffs may not recover on tort claims if they do not satisfy the FTCA's procedural requirements. See, *e.g.*, *McNeil* v. *United States*, 113 S. Ct. 1980, 1983 (1993). Under the approach advanced by respondent and the court of appeals, it is unclear whether cases like *McNeil*—where recovery was denied on the ground that the plaintiff failed to submit a timely administrative claim as required by the FTCA—could nonetheless be brought as ordinary tort claims directly against a sue-and-be-sued agency. In our view, however, the answer to that question is simple. If a claim is for a tort, it is "cognizable" under the FTCA and cannot be brought against a sue-and-be-sued agency outside the FTCA.

disregards the broad and untoward effects of the court of appeals' holding.

2. We explain in our opening brief (Gov't Br. 23-24) that respondent's claim is also defective because a suit against the government must be based not merely on a waiver of sovereign immunity, but also a source of law that "can fairly be interpreted as mandating compensation by the Federal Government." *United States* v. *Testan*, 424 U.S. 392, 402 (1976); see also *United States* v. *Hopkins*, 427 U.S. 123, 130 (1976) (per curiam); *United States* v. *Mitchell*, 463 U.S. 206, 218 (1983). The provision on which respondent relies—the Due Process Clause—does not satisfy that criterion.

Respondent argues that *Bivens* establishes that the Due Process Clause is "a natural predicate for money damages." Br. 33; see also Br. 27. *Bivens* involved a suit against a federal official (not the federal government) for a claimed violation of the Fourth Amendment (not the Due Process Clause). By permitting that action to proceed, the Court did not have the occasion to address, much less decide, whether the Due Process Clause mandates compensation against the government. The issue was squarely presented, however, in *Hopkins*, a specific holding of which was that a claim of deprivation of a property right under the Due Process Clause had to be dismissed because the Clause could not be read to mandate compensation against the government. Although, as respondent points out, *Hopkins* was a brief per curiam decision, the case squarely stands for the point we argue here, and it has never been disapproved or overruled. See also *Schillinger* v. *United States*, 155 U.S. 163, 168 (1894).

Respondent also argues (Br. 34-35) that a contrary result is required by *Mitchell*. If respondent were correct, *Mitchell* must have *sub silentio* limited or overruled *Testan* and *Hopkins*. *Mitchell*, however, did

neither. The source of law mandating compensation by the federal government in *Mitchell* was the common law of fiduciary relationships. 463 U.S. at 225. As the Court explained, breach of trust, like breach of contract or negligence, is a traditional common law cause of action redressable—in many cases exclusively redressable—by money damages. *Id.* at 226. The Court therefore found that "it naturally follows" that such common law causes of action mandate money damages against any entity against which suit can be brought. *Ibid.* Indeed, a waiver of sovereign immunity from such causes of action would make little or no sense absent the ability of a plaintiff to obtain money damages.[2] *Mitchell* stands for that unremarkable proposition.

The situation is entirely different, however, with sources of law—such as the Due Process Clause—that impose duties that are ordinarily redressable by relief other than money damages. In such cases, it is reasonable to assume not that a waiver of sovereign immunity extends to money damages, but rather that in the absence of an express right to money damages against the government, a plaintiff must pursue other forms of relief. The Due Process Clause, unlike the Just Compensation Clause, contains no such express right to monetary compensation. As relevant here, it provides that "[n]o person shall be deprived of * * * property, without due process of law." The only remedy the Clause necessarily suggests is a right to restoration of the property in question if a person has been deprived of it without the requisite process—just as a right to restoration of freedom (through habeas corpus or otherwise) is the ordinary remedy if a person is deprived of liberty without due process. In neither case is monetary compensation mandated or even suggested.

[2] It has been held that the primary purpose of FSLIC's sue-and-be-sued clause was to permit such common law contract actions to be brought by individuals against FSLIC to obtain deposit insurance payments. See, *e.g.*, *Abbott Building Corp.* v. *FSLIC*, 739 F. Supp. 532, 534 (D. Nev. 1990), aff'd, 951 F.2d 191 (9th Cir. 1991); *Jugum* v. *FSLIC*, 637 F. Supp. 1045, 1047 (W.D. Wash. 1986).

This conclusion also follows in the context of this case from the settled principle that waivers of sovereign immunity must be narrowly construed. It is supported as well by the principle that payment of funds under the Appropriations Clause may only be made on the basis of "express terms" that establish a "substantive right to compensation." *OPM* v. *Richmond*, 496 U.S. 414, 432 (1990); see p. 8, *infra*. *Hopkins* was based on those principles, is entirely consistent with *Mitchell*, and squarely governs this case.

3. Respondent also disputes (Br. 16-25) our contention that there are a number of special factors counselling hesitation that would make implication of a *Bivens* right of action in this context inappropriate.

a. The most significant "special factor counselling hesitation" in this case is also the most obvious—the fact that this suit was brought directly against a federal agency and could thus result in a judgment for damages directly against a federal agency or instrumentality. That fact was recognized as a special factor counselling hesitation in *Bivens* itself. See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971). Respondent's effort to eliminate that factor could only result in weakening one of the fundamental limitations on this Court's holding in *Bivens* that permitted implication of private rights of action against federal employees for violation of the Constitution.

We have already responded (Gov't Br. 25-26) to respondent's argument (Br. 16) that the effect on the federal fisc is insignificant because it is no greater than the effect on the federal fisc of a *Bivens* action against a

federal employee who is then indemnified by the government. There is a substantial—and, in this case, dispositive—legal difference between a government expenditure pursuant to an authorized indemnification policy and a court order that the government shall pay a judgment on a claim for which government indemnification has never been authorized.

Respondent also argues that *OPM* v. *Richmond*, 496 U.S. 414 (1990), does not support our argument because "there was no consensus, among the Justices writing opinions in [*Richmond*], for the proposition that the Appropriations Clause would bar the Court from ordering payments from a federal agency where payment is required to remedy a violation of the Due Process Clause." Br. 17. The opinion of the Court in *Richmond*, however, stated in plain terms that "funds may be paid out only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute." 496 U.S. at 432.[3] That reasoning would also appear to permit funds to be paid out pursuant to constitutional provisions, such as the Just Compensation Clause of the Fifth Amendment, that expressly provide a right to compensation, where Congress has enacted the requisite waiver of sovereign immunity. See 28 U.S.C. 1491 (Tucker Act). But the Court's rationale in *Richmond* would preclude payment of government funds to remedy violations of other constitutional provisions,

[3] Respondent cites (Br. 17) Justice White's concurring opinion in *Richmond* in support of his position. That opinion addresses the question whether Congress may use its appropriations power to control the exercise of powers granted to other branches. 496 U.S. at 435. This case involves no such question, and nothing in Justice White's opinion suggests any disagreement with the Court concerning the limitations on appropriations of government funds in cases such as this.

such as the Due Process Clause, that do not expressly provide rights to compensation.

Respondent also asserts (Br. 18-19) that *Richmond* is inapplicable because Congress has appropriated funds for FSLIC and any judgment would come out of those appropriated funds. That argument essentially mirrors the rationale of Justice Stevens' opinion concurring in the judgment in *Richmond*, see 496 U.S. at 435—an opinion that rejected the rationale of the Court and in which no other Member of the Court joined. Moreover, the statute cited by respondent (Br. 18) provides no support for his contention that Congress appropriated money for FSLIC to pay judgments in cases like this. The statute, which generally governs appropriations for wholly owned government corporations, provides that Congress "shall * * * make necessary appropriations *authorized by law* [and] * * * make corporate financial resources available *for operating and administrative expenses*." 31 U.S.C. 9104(a)(2) and (3) (emphasis added). That provision does not suggest that the resulting appropriations may be used for payments that have *not* been authorized by law. In that respect, it is precisely parallel to the provision establishing the judgment fund, 31 U.S.C. 1304, which, as we explain in our opening brief (Gov't Br. 26 n.20), creates no "substantive right to compensation." *Richmond*, 496 U.S. at 432.

b. We argue in our opening brief (Gov't Br. 26-28) that a second factor counselling hesitation is Congress's recognition, embodied in the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), that policy decisions of federal officials, such as the decision to terminate respondent's employment, ought not be subject to judicial review via the medium of a tort suit. See *United States* v. *Gaubert*, 111 S. Ct. 1267, 1273 (1991).

Respondent claims (Br. 22-23) that permitting a *Bivens* action in the context of this case would not be

inconsistent with the discretionary function exception. Indeed, in his view (Br. 22), the discretionary function exception is irrelevant to this case, since this is a *Bivens* action and is not subject to the FTCA. Our argument is not, however, that the discretionary function exception directly applies to this case. It is rather that this Court, in determining whether it is appropriate to imply a *Bivens* action in a particular context, ought to give substantial weight to Congress's judgments about the proper means to obtain judicial review of the actions of a government agency. The discretionary function exception embodies Congress's judgment that a tort suit against the government for damages is not an appropriate means for obtaining such judicial review. It would therefore be inappropriate to imply a *Bivens* action in such circumstances.[4]

c. Finally, respondent disputes (Br. 23-25) our argument that implication of a *Bivens* remedy would be inappropriate because of the existence of alternative remedial mechanisms. We focused (Gov't Br. 28-29) on the existence of two such mechanisms in particular: the FTCA and the receivership claims process.

Respondent argues that the existence of both of those elaborate remedial schemes is irrelevant, because Congress has not "fashioned an alternative remedy explicitly declared to be a substitute for recovery under the Constitution and viewed as being equally effective." Br.

[4] The statutory policy embodied in 28 U.S.C. 2679(a)—even if the Court should conclude that the text of that Section does not by its terms foreclose this suit (but see pp. 1-4, *supra*)—also counsels hesitation against judicial "implication" of a cause of action against the government in the absence of affirmative approval by Congress. The thrust of Section 2679(a), enacted long before *Bivens*, was to put sue-and-be-sued agencies and instrumentalities on an equal footing with all other agencies and instrumentalities with respect to tort claims. See p. 4, *supra*.

23. If that were the test, however, this Court's decisions in *Bush* v. *Lucas*, 462 U.S. 367 (1983), and *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), would be inexplicable. As we point out in our opening brief (Br. 28), in both of those cases, this Court declined to imply a *Bivens* action because of the existence of alternative remedial mechanisms. In neither case had Congress "explicitly" declared its remedy "to be a substitute for recovery under the Constitution" and in neither case was the remedy "equally effective," at least in the view of the plaintiff in the *Bivens* action. See *Chilicky*, 487 U.S. at 425; *Bush*, 462 U.S. at 388. In both *Bush* and *Chilicky*, as in this case, elaborate mechanisms were available whereby those suffering injuries of the sort that the *Bivens* plaintiff claimed could obtain redress. In both *Bush* and *Chilicky*, the "design" of the government program "suggests that Congress has provided what it considers adequate remedial mechanisms." *Chilicky*, 487 U.S. at 423. The same is true here.

4. As we explain in our opening brief (Gov't Br. 29-36), even if this suit for money damages is not barred, respondent has failed to state a claim for violation of the Due Process Clause, because he was not deprived of any property interest. Although state law provided him with a right to continued employment with Fidelity absent good cause, state law could not have given him an expectation of continued employment once a federal receiver had taken over Fidelity. Federal law granting FSLIC as receiver broad powers over an institution in receivership, including powers to employ such personnel as appropriate and to repudiate contracts, governs the contractual relationships of the receiver, and it prevails over any state law that would limit those federally granted powers.

Respondent's primary argument (Br. 35-41) is that his state-created right to continued employment extended

even to the situation in which a federal receiver was appointed to dispose of or liquidate Fidelity.[5] At the time respondent's employment was terminated, a federal regulation provided that FSLIC as receiver could "[r]eject or repudiate any lease or contract which it considers burdensome." 12 C.F.R. 569a.6(c)(3) (1982). In respondent's view (Br. 36-40), that regulation imposed an obligation on the federal receiver that was equivalent to the obligation imposed on Fidelity under state law to continue respondent's employment.

The regulation on which respondent relies gave extremely broad discretion to FSLIC as receiver to repudiate contracts. That authority mirrored the authority that receivers had at common law. See cases cited at Gov't Br. 31 n.24. See also *United States Trust Co.* v. *Wabash Western Ry.*, 150 U.S. 287, 299 (1893) (receiver not bound to adopt contracts "if in his opinion it would be

[5] Respondent argues (Br. 37-38) that, before Fidelity was put into receivership, his right to continued employment under state law was not an "unsafe or unsound" practice under 12 C.F.R. 563.39. We have not argued, however, that his right to continued employment was generally invalid prior to receivership, but only that state law could not, and did not, give him a legitimate expectation of continued employment in the event Fidelity was placed in federal receivership. Similarly, respondent's amicus alleges that our analysis "ignore[s]" 12 C.F.R. 563.39. Nat'l Employment Lawyers' Ass'n Amicus Br. 16. That view is apparently based on amicus's premise that an employment contract that is not an "unsafe or unsound" practice under 12 C.F.R. 563.39 is entitled to enforcement, even when the employer thrift fails and is taken over by a federal receiver. See Amicus Br. 11. Nothing in 12 C.F.R. 563.39, however, suggests that it was intended to address the authority of a receiver in any way. Moreover, the primary function of a receiver is not to operate the failed institution and avoid committing "unsafe or unsound" practices. Rather, the receiver's task is to liquidate or dispose of the institution as quickly as possible, at the least expense to the institution's creditors, including the federal insurance fund.

unprofitable or undesirable to do so"). In the analogous bankruptcy context, this Court has noted that the "traditional" and generally applicable test for repudiation of contracts is the highly deferential business judgment rule. See *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 523 (1984). Under that rule, a bankrupt's decision to repudiate an executory contract must be accepted "unless it is shown that the * * * decision was one taken in bad faith or in gross abuse of the bankrupt's retained business discretion." *Lubrizol Enterprises, Inc.* v. *Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1046-1047 (4th Cir. 1985), cert. denied, 475 U.S. 1057 (1986). Since 1941, when the first regulations governing federal banking receivers were promulgated, they have used language identical to that in the regulation at issue here to give receivers the same broad powers to repudiate contracts. See 6 Fed. Reg. 4414 (1941) (promulgating 24 C.F.R. 204.10(*l*) (1941)).[6]

The breadth of the receiver's discretion in determining whether to repudiate a contract is apparent from the face of the regulation, which provided that FSLIC had the power to repudiate contracts "it considers" burdensome. In *Webster* v. *Doe*, 486 U.S. 592, 600 (1988), the Court construed an equivalent provision permitting the dismissal of a CIA employee when the Director of the CIA "shall *deem* such termination necessary or advisable in the interests of the United States." The Court noted that the standard "fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review." *Ibid.* Here, the regulation both entrusts the "burdensomeness" determination to the receiver and provides no standards by

[6] The regulation was later recodified at 12 C.F.R. 549.3(a) (1989) (repealed in 1989); see also 12 U.S.C. 1821(e)(1) (Supp. IV (1992) (current statutory right of FDIC to repudiate contracts).

which the receiver's determination on that point could be judged.[7] Cf. *Lincoln* v. *Vigil*, 113 S. Ct. 2024, 2032 (1993).

Moreover, although federal regulations had long given FSLIC as receiver authority to repudiate contracts, the specific regulation at issue in this case was promulgated in response to Congress's enactment of the Bank Protection Act of 1968, Pub. L. No. 90-389, § 6, 82 Stat. 295-296 (codified at 12 U.S.C. 1729(c)(2) and (3)). See 33 Fed. Reg. 11,844 (1968) (notice of proposed regulations); 33 Fed. Reg. 14,366 (1968) (promulgating regulations). That statute gave federal regulators authority for the first time to require that FSLIC be appointed as receiver for failed federally insured state-chartered institutions. As we noted in our opening brief (Gov't Br. 30), the 1968 Act gave extremely broad powers to FSLIC as receiver to liquidate or dispose of the institution. Far from subjecting FSLIC's actions as receiver to conditions imposed by state law, Congress intended that "[t]he authority of the FSLIC * * * would be subject only to the regulation of the Federal Home Loan Bank Board and not to that of any State authority, administrative or judicial, which may previously have had regulatory authority with respect to the institution." S. Rep. No. 1263, 90th Cong., 2d Sess. 10 (1968). To underscore the point, Congress prohibited judicial review by providing that no court may "restrain or affect the exercise of

[7] Respondent asserts (Br. 39 n.13) that recognition that federal receivers have broad discretion to repudiate contracts would "allow decisions based on race, age or gender." That is mistaken. We have established that the federal banking regulatory scheme grants FSLIC as receiver broad and unreviewable discretion to repudiate contracts. The fact that the federal banking regulatory scheme imposes no justiciable limits on the receiver's power to repudiate contracts, however, does not imply that it is immune from applicable constitutional norms.

powers or functions of a * * * receiver." 12 U.S.C. 1464(d)(6)(C).

In determining whether respondent had a property interest in continued employment by the receiver, the key question is whether respondent had a legitimate expectation of such employment. In light of the extremely broad discretion granted FSLIC as receiver to repudiate contracts, the answer to that question must be "no." The applicable regulations, as well as the entire legal framework governing federal receiverships, can only be construed to inform those who contract with financial institutions that they should have *no* expectation of continued performance of their contracts if the institution fails and a federal receiver is appointed.[8] The receiver's broad powers preclude the possibility that the receiver's ability to repudiate employment contracts was limited in the same way that a California employer would be in discharging an employee.

5. a. We argue in our opening brief (Gov't Br. 37-44) that, even if respondent retained a property interest in continued employment by the federal receiver, he also had adequate postdeprivation remedies that provided him with all the process that was due. Respondent claims

[8] Indeed, it would appear that the fundamental premise of respondent's argument is the perverse claim that 12 C.F.R. 569a.6(c)(3) (1982)—which was intended to give the federal receiver a broad right to repudiate contracts—gave respondent a protected property interest in continued employment. That premise is explicit in respondent's argument (Br. 40 n.14) that the issue at a hearing would be "whether [respondent's] implied employment contract was 'burdensome'"—*i.e.*, whether the receiver's action comported with the *federal* regulation. That premise, however, is inconsistent not only with the plain language and intent of the federal regulation, but also with the position that respondent has taken throughout this litigation that his property interest derived solely from state law.

(Br. 43) that a postdeprivation remedy is never adequate where termination of employment is at stake.

Even in employment cases, this Court has never adopted a rigid rule requiring a predeprivation hearing. In *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 542-545 (1985), the Court did find that a predeprivation hearing was necessary. But, as we explain in our opening brief (Gov't Br. 40), the factors on which the Court based its decision in *Loudermill* are not applicable here. Moreover, in *FDIC* v. *Mallen*, 486 U.S. 230, 241 (1988), the Court held in a closely related context that a bank officer may be suspended without a predeprivation hearing. And in *Barry* v. *Barchi*, 443 U.S. 55, 65 (1979), the Court concluded that a horse trainer's license may be suspended—an action that would necessarily lead to loss of employment for the trainer—without a predeprivation hearing. There is no absolute rule requiring a predeprivation hearing when the property right at issue involves loss of employment.

More fundamentally, the Due Process Clause does not rigidly distinguish between employment and other cases. Regardless of the precise nature of the property interest at stake, exigent circumstances coupled with an adequate postdeprivation remedy can satisfy the demands of due process. This Court has applied that principle in a number of areas. Respondent offers no reason why it should be held inapplicable here.

b. Respondent asserts that the postdeprivation claims process was "illusory" (Br. 45) and therefore a predicate for the application of the doctrine of *Parratt* v. *Taylor*, 451 U.S. 527 (1981), and *Hudson* v. *Palmer*, 468 U.S. 517 (1984), is absent. In his view (Br. 45), the process for submission of claims is available only for claims based on wrongful conduct prior to the receivership.

Respondent is mistaken as to the scope of the claims process established by FSLIC regulations and discussed

by this Court in *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989).[9] That process was available to any party with a claim against the estate. Respondent cites nothing in the regulations or in this Court's decision in *Coit* that limited the process to claims arising from "preseizure wrongful conduct" or, indeed, to claims arising from "wrongful" conduct of any kind. Nor is there any reason in law or logic why the claims process would have been so limited. Rather, the process was available to satisfy all claims against the estate of the failed institution. It was available regardless of whether the claim accrued prior to the seizure of the institution or as a result of the repudiation of a contract by the receiver, and regardless of whether it arose as the result of "wrongful" conduct or as a result of the receiver's appropriate exercise of the power to repudiate an executory contract.

Respondent also speculates (Br. 45-46) that the claims process would have afforded an inadequate remedy because, had he submitted a claim, the receiver would have denied it on the ground that he had no contractual right that was violated. Even if respondent's speculation were correct, however, it would have no bearing on the analysis. The adequacy of the postdeprivation remedy does not turn on whether respondent would have recovered on his claim; insofar as his claim was invalid, it is to be expected that a fair and adequate postdeprivation remedy would result in a denial of payment. The relevant point for present purposes is that if a fair procedure was avail-

[9] The claims process that was in effect at the time of *Coit* differed from that which was employed in the early 1980s, when this case arose. See *Coit*, 489 U.S. at 580-582. Those differences, however, suggest that the claims process at the time of this case provided a more effective remedy than the process in effect at the time of *Coit*. They are thus of little relevance to the decision in this case.

able, it would provide him with all the process that was due on his claim for breach of contract, and would thereby vitiate his claim that he was deprived of property without due process of law.

In a footnote, respondent states (Br. 46 n.16) that his contractual claim against the estate could only be satisfied out of assets of the estate, and that no such assets were likely to have been available to satisfy his claim. That possibility, however, would not advance respondent's argument. First, the possibility that respondent's claim—like that of any other creditor—might not have been paid in full does not affect the due process analysis. It no more gives him a right under the Due Process Clause than it would give such a right to any other creditor who receives less than full payment on a claim because the estate's funds are inadequate. Any other result would generally call into question the constitutionality of bankruptcy and insolvency laws. Second, respondent did not submit a claim, and it was nowhere determined that, had he submitted a valid claim, there would have been no funds available from which to pay it. In fact, contrary to respondent's assertion (Br. 46 n.16), the record in this case demonstrates that funds were available to satisfy any valid claim respondent would have submitted. It was stipulated by the parties that Fidelity's assets were transferred to Fidelity Savings and thence to Citicorp, but that "[b]y virtue of the various transactions occurring after the seizure, the FSLIC assumed and undertook to pay and discharge valid liabilities, if any, arising out of [respondent's] employment with or termination from" Fidelity. J.A. 75. Accordingly, this case presents no question concerning the application of the successorship doctrine or the legal consequences of a receiver's transfer of assets from a failed banking institution without such a provision for payment of the institution's liabilities.

In short, respondent had the opportunity to submit his contract claim either to the receiver, with subsequent *de novo* determination by a federal district court if he so desired, or directly to a federal district court. Either route would have provided him with a fair opportunity to establish that he had a contractual right that was breached. Moreover, the remedy for a breach of his contract by Fidelity prior to receivership would have simply been an action for contract damages. See Gov't Br. 43. There is no reason why that same remedy should be regarded as inadequate for the same breach of contract that allegedly occurred after FSLIC succeeded to Fidelity's contractual obligations. Under *Parratt* and *Hudson*, the claims process, including the right to bring suit in federal court, provided him with all the process that was due.

Respondent finally asserts (Br. 46) that our argument ignores the fact that his claim in this case is for violation of the Due Process Clause, not for breach of contract. But it is respondent who misses the point. Respondent alleges that he was deprived of a contractual right to continued employment and that he received inadequate process before that deprivation occurred. *Parratt* and *Hudson* establish that the ordinary processes of tort law may provide all of the process that is due to someone who alleges that he was deprived of a property interest as a result of state action. See also *Ingraham* v. *Wright*, 430 U.S. 651, 676-680 (1977) (liberty interest). The claims process—including the opportunity to bring an ordinary contract claim in federal court—similarly provided all the process that was due to respondent. Although the claims process did not provide a *remedy* for his alleged violation of due process, the existence and adequacy of that process established, as in *Parratt*, *Hudson*, and *Ingraham*, that there was no due process violation. As we explain in our opening brief (Gov't Br. 43

n.33), any other result would convert any governmental breach of contract not preceded by a hearing—including any repudiation of a contract by a federal banking receiver—into a violation of the Due Process Clause.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JULY 1993

(6)

NO. 92-741

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FEDERAL DEPOSIT
INSURANCE CORPORATION,

Petitioner,

v.

JOHN H. MEYER, et al

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF AMICUS CURIAE
OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
IN SUPPORT OF RESPONDENT**

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BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION (NELA)
IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE

The National Employment Lawyers Association respectfully submits this brief amicus curiae in support of Respondent in this case. The written consents of all parties have been filed with the Clerk of this Court.

The National Employment Lawyers Association (NELA) is a national bar association of over 1600 lawyers who regularly represent both public and private sector employees in employment related disputes. NELA is at the forefront of the national movement to recognize that all employees have the right to employment terminable only for cause. In addition, NELA members represent many employees with employment rights created by state law which have been terminated by government action.

NELA therefore has a compelling interest not only in ensuring that state rights to employment terminable only for cause, either express or implied, are recognized but also that the federal government does not unilaterally and arbitrarily deprive an employee of those rights. NELA therefore submits this brief because of the importance of the issues at bar to furthering these goals.

SUMMARY OF ARGUMENT

1. The government may not deprive a person of his (her) ... "property without due process of law." U.S. Constitution, Amendment V. An employee's right to continued employment may rise to the level of a constitutionally protected property right where state law establishes a "legitimate claim of entitlement." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). A claim of entitlement is established by "agreements implied from 'the promisor's words and conduct in light of the surrounding circumstances' ..." Perry v. Sindermann, 408 U.S. 593, 602 (1972).

Here, respondent Meyer had a claim of entitlement by virtue of an implied agreement under California law. The FDIC seeks to vitiate Meyer's agreement by arguing it has a right to terminate bank management at will. FDIC brief pgs. 30-31. Nothing in the provisions cited by the FDIC, however, confers such broad discretion. The only right granted to the FDIC as receiver is "to [r]eject or repudiate ... any ... contract which it considers burdensome." 12 C.F.R.

§569a.6(c)(3). Therefore, Meyer could reasonably have expected that his contract would be enforced unless and until the FDIC determined the contract was burdensome.

2. If Congress had intended to vest the FDIC with the authority it seeks, Congress would have taken such action. For example, Section Four, Fifth of the Federal Reserve Act empowers the Federal Reserve Bank to "dismiss at pleasure" its officers and directors. Given such authority, any employment contract limiting the Federal Reserve Bank's right to terminate only for cause is unenforceable. No such authority has been given by Congress to the FDIC.

3. The FDIC asserts that employment contracts such as respondent's are "exactly parallel" to unwritten side agreements which are unenforceable against a receiver under the D'Oench doctrine. This is not an action on a promissory note, and therefore, D'Oench does not apply.

4. The FDIC in this case is attempting to secure for itself "unreviewable authority ... to repudiate contracts in its sole

discretion." FDIC brief p.32. The FDIC is asking this Court to ignore 12 C.F.R. §569.39, to read the burdensome requirement out of 12 C.F.R. §596a.6(c)(3) and, in so doing, legislate a rule that would allow the FDIC to defeat the contract rights of third parties where no such express authority exists. The FDIC would prefer to exercise this discretion without any outside scrutiny and thus with no guarantee that it would not arbitrarily deprive respondent, or others similarly situated, of their legitimate entitlement to employment and/or due process.

5. Due process requires notice and an opportunity to be heard at a "meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). This Court has consistently held that the notice and opportunity must come **before** a person is deprived of a constitutionally protected right to employment. Cleveland Board of Education v. Loudermill, 470 U.S., at 542. A post-deprivation hearing is only justified by a compelling government interest. Boddie v. Connecticut, 401 U.S. 371, 379 (1971). Post-

deprivation hearings are rarely, if ever, appropriate where termination of the contract, as in this case, is virtually irreversible.

The primary reasons cited by the FDIC - the need to act quickly, cutting costs, no need for management assistance and the acquiring institution's desire to place its own people in charge - do not establish a compelling government interest which would outweigh the employee's right to notice and a pre-deprivation hearing.

ARGUMENT

A. A Legitimate Entitlement To Continued Employment Is Not Extinguished By The "Broad Statutory Mandate" Under Which The FDIC Operates.

Under California law, an employee's right to continued employment subject to dismissal for cause may rise to the level of a constitutionally protected property interest. Federal regulations governing employment contracts between a savings and loan institution and its employees and empowering the FDIC to reject or repudiate such contracts do not diminish or extinguish that property interest.

1. A person may not be deprived of his "life, liberty or property without due process of law." U.S. Constitution, Amendment V.

An employee's right to continued employment may rise to the level of a constitutionally protected property right where state law establishes a "legitimate claim of entitlement." Board of Regents v. Roth, 408 U.S. 564, 577 (1972); see also Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). A claim of entitlement is established not only by express contractual or statutory terms but also by "agreements implied from 'the promisor's words and conduct in light of the surrounding circumstances' ... [and] relating them to the usage of the past." Perry v. Sindermann, 408 U.S. 593, 602 (1972). Thus, this Court, as well as most state courts, including California, recognize that the right to terminate employment at the will of the employer is limited by an implied contract to terminate only for cause. [1] Id.

[1] See Cleary v. American Airlines, Inc., 111 Cal.App.3d 443 (1980); Eagles v. Tanana Valley Medical-Surgical Group, Inc.;

at 600-601. The existence of an implied contract gives an employee an entitlement that he (she) cannot be deprived of by government action without due process. Perry, 408 U.S. at 603.

In the case at bar, Meyer had a legitimate expectation of continued employment, i.e., an implied contract subject

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663 P.2d 958 (Alaska 1983); Wagenseller v. Scottsdale Memorial Hospital, 147 Ariz. 370, 710 P.2d 1025 (1985); Wing v. JMB Property Management Corp., 714 P.2d 916 (Colo.App. 1985); Morgan v. Avondale Shipyards, 376 S.2d 516 (La. Ct.App. 1979); Wyman v. Osteopathic Hospital of Maine, Inc., 493 A.2d 330 (Me. 1985); Staggs v. Blue Cross of Md., 61 Md.App. 381, 486 A.2d 798 (1985); Brookshaw v. South St. Paul Feed Inc., 381 N.W. 2d 33 (Minn. App. 1986); Hinkeldey v. Cities Service Oil Co., 470 S.W. 2d 494 (Mo. 1971); Guidice v. Drew Chem. Corp., 210 N.J. Super 32, 509 A.2d 200 (1986); Hernandez v. Home Educ. Livelihood Program, Inc., 98 N.M. 125; 645 P.2d 1381 (N.M. App. 1982); Leithead v. American Colloid Co., 721 P.2d 1059 (Wyo. 1986); Chamberlain v. Bissel, Inc. 547 F.Supp. 1067 (W.D. Mich 1982); Mannikko v. Harrah's Reno, Inc., 630 F.Supp. 191 (D. Nev. 1986); Thompson v. American Motor Inns, Inc., 623 F.Supp. 409 (W.D. Va. 1985); Wolk v. Saks Fifth Avenue, Inc., 728 F.2d 221 (3rd Cir. 1984).

to termination for cause under California law. The FDIC, however, seeks to vitiate this expectation by arguing that "the 'broad statutory mandate' granted federal receivers ... necessarily included a right to terminate bank management at will ... ." FDIC brief pgs. 30-31. Nothing in the provisions cited by the FDIC, however, confers any such unfettered discretion; nor should they be so construed.

12 C.F.R. §563.39, in effect during respondent's employment, provided:

> An insured institution shall not enter into an employment contract with any of its officers or other employees if such contract would constitute an unsafe or unsound practice ... [T]he making of such an employment contract would be an unsafe or unsound practice if such contract could lead to material financial loss or damage to the insured institution or could materially interfere with the exercise by the members of its board of directors of their duty of discretion as provided by law, charter, bylaw or regulation as to the employment of an officer or employee of the institution. This may occur, depending upon the

> circumstances of the case, where an employment contract provides for an excessive term, or does not contain an appropriate termination for cause provision.

Nothing in this section prohibited Meyer (or any other employee) and his employer, Fidelity Savings, from entering into an employment contract terminable for good cause. [2] Moreover, the record is devoid of any indication: 1) that Meyer's contract could cause financial loss or damage to Fidelity; 2) that it would interfere in any way with the exercise of discretion by Fidelity's directors; or 3) that a contract limiting Fidelity's right to terminate only for good cause is an excessive term or is somehow inappropriate.

The only right granted to the receiver regarding existing contracts is "to [r]eject or repudiate any ... contract which it

[2] In California, good cause is defined as "a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power." Wood v. Loyola Marymount University, 218 Cal.App. 3d 661, 670 (1990).

considers burdensome." 12 C.F.R. §569a.6(c)(3) (1982). When read in conjunction with 12 C.F.R. §569.39, Meyer could reasonably have expected that his contract would be enforced unless it contained provisions which amounted to an "unsafe or unsound practice." Any such contract would presumably be "burdensome" as well.

Accordingly, contrary to the FDIC's contention, respondent's expectation of continued employment does not contradict the "broad statutory mandate." As the Ninth Circuit correctly concluded, "[t]he fact that federal, and arguably, state law conferred wide discretion to receivers to repudiate 'burdensome' contracts does not, retrospectively, annul the state entitlement." Meyer v. Fidelity Savings, 944 F.2d 562, 574 (9th Cir. 1991); (Appendix A to Writ of Certiorari, p.26a).

2. If Congress had intended to vest the FDIC with the authority it seeks, Congress would have taken such action. This court need only look to Section Four, Fifth of the Federal Reserve Act of 1913 (12 U.S.C. 341, Fifth) to

find support for this proposition. Section Four, Fifth empowers the Federal Reserve Bank to "dismiss at pleasure" its officers and directors. Given such authority, any employment contract, express or implied, limiting the Federal Reserve Bank's right to terminate only for cause is void and unenforceable. See Bollow v. Federal Reserve Bank, 650 F.2d 1093, 1097 (9th Cir. 1981) [3]; Inglis v. Feinerman, 701 F.2d 97 (9th Cir. 1983). No such express authority has been granted to the FDIC, and none should be implied.

3. The FDIC asserts that employment contracts such as respondent's are "exactly parallel" to unwritten side agreements which are unenforceable against a receiver under the doctrine of D'Oench, Duhme and Company, Inc.

[3] The Bollow court relied on two other cases interpreting statutes containing dismissal at pleasure language which came to the same conclusion; Sims v. Fox, 505 F.2d 857 (5th Cir. 1974) cert. denied, 421 U.S. 1011 (1975) and Ventetuoio v. Burke, 470 F.Supp. 887 (D.R.I. 1978), aff'd, 596 F.2d 476 (1st Cir. 1979).

v. FDIC, 315 U.S. 447, 456 (1942). The FDIC reaches this conclusion by making the erroneous assumption that Meyer's state law entitlement was invalidated by the appointment of a federal receiver. This position is factually incorrect because it is not the appointment of a federal receiver that invalidates a contract, but rather the subsequent exercise of discretion by the receiver to accept some contracts and reject or repudiate others.

Moreover, and perhaps more importantly, the fundamental rationale of the D'Oench doctrine does not apply to this case. The D'Oench doctrine establishes that the FDIC as a receiver cannot be held liable for a claim based upon an unrecorded oral or written side agreement which is inconsistent with the written documents of the institution. D'Oench, Duhme and Co., 447 U.S. at 459. The doctrine encompasses any claim against the insolvent institution that would increase its liabilities or diminish the value of its assets. Id. at 460, 461.

"The doctrine is 'a common law rule of estoppel precluding a borrower from asserting against the FDIC defenses based upon secret or unrecorded 'side agreement' that alter the terms of facially unqualified obligations." Campbell Leasing, Inc. v. FDIC, 901 F.2d 1244, 1248 (5th Cir. 1990).

The purpose of the doctrine was recently discussed in Walsh v. New West Federal Savings & Loan Assn., 234 Cal.App.3d, 1539, 1544 (1991):

> As the U.S. Supreme Court recently explained, a primary purpose of the doctrine 'is to allow federal and state bank examiners to rely on a bank's records in evaluating the bank's assets.' Langley v. FDIC, 484 U.S. 86, 91 (1987) ... The doctrine also seeks to 'ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms with the collusion of bank employees, when a bank appears headed for failure.' (Id. at p.92). Thus, "[t]he doctrine encourages debtors to memorialize all agreements in writing and reflects the equitable principle that losses incurred as a result of unrecorded arrangements should not fall on deposit insurers, depositors or creditors but rather upon the person who could have best avoided the loss.' (Webb v. Superior Court, supra, 225 Cal.App. 3d at p.95, quoting Fair v. NCNB Texas National Bank, (N.D. Tex. 1990) 733 F.Supp. 1099, 1103.

Given the purposes of the doctrine, several courts have held that claims other than those based upon secret or unrecorded side agreements are not barred by the D'Oench doctrine. See Campbell Leasing, Inc. v. FDIC, 901 F.2d at 1244. [Although the D'Oench doctrine precludes claims for tortious interference with contract, breach of security agreement and intentional infliction of emotional and mental distress as a set-off to liability on a promissory note, it does not prevent the assertion of these theories as separate claims.]; Resolution Trust Corporation v. Murray, 935 F.2d 89 (5th Cir. 1991). [D'Oench doctrine prevents the assertion of any claims against the RTC to escape liability on promissory note, however an independent action for damages is permitted. FDIC v. Brodie, 602 So.2d 1358 (Fla.App. 1992). [Counterclaim to recover

monies due for service rendered at bank's request is not barred when not asserted in an attempt to avoid, or defend against promissory note]; Thomka v. Financial Corporation of America, 15 Cal.App. 4th 877 (1993). [The D'Oench doctrine does not preclude an action for breach of an implied employment agreement that an employee would only be terminated for cause.]

4. The most disturbing aspect of the FDIC's position in this matter is its attempt to secure for itself "unreviewable authority ... to repudiate contracts in its sole discretion." FDIC brief pg. 32. The FDIC is asking this court to ignore 12 C.F.R. §569.39, to read the "burdensome" requirement out of 12 C.F.R. §569a.6(c)(3) and, in so doing, to legislate a rule that would allow the FDIC, and presumably other government agencies, to defeat the legitimate contract rights of third parties where no such express authority has been granted by Congress. The FDIC's attempt here to legislate such a rule is directly at odds with the very right at stake in this case, i.e, the right to due process.

The right to due process is the right to "some kind of hearing" before the person is deprived of any significant property interest. Cleveland Board of Education v. Loudermill, 470 U.S. at 542 (1985). "The touchstone of due process is protection of the individual against arbitrary action of government." Wolff v. McDonnell, 418 U.S. 539, 558 (1974). "The prior decisions of this court ... establish a principle that is as obvious as it is compelling -- i.e., federal and state government and governmental agencies are restrained by the Constitution from acting arbitrarily with respect to employment opportunities that they either offer or control." Board of Regents v. Roth, 408 U.S. at 588 (Marshall, T. dissenting). As stated in Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972):

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his [property]. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to

> protect his use and possession of property from arbitrary encroachment - to minimize substantially unfair or mistaken deprivations of property ...

Respondent was entitled to continued employment pursuant to his contract with his employer, subject to termination only if the FDIC determined that his contract was burdensome. The FDIC would prefer to make these decisions in secret without any outside scrutiny, and thus with no guarantee that they would not arbitrarily or unfairly deprive respondent, or others similarly situated, of their legitimate entitlement to employment and/or due process. It is just this kind of decision making that the Fifth Amendment is intended to prevent.

B. Due Process Can Only Be Satisfied When An Employee Is Provided With A Pre-deprivation Hearing.

The FDIC asserts that a pre-deprivation hearing is not required when a contract is rejected or repudiated because the necessity for quick action as well as the availability of a meaningful opportunity to be heard

following termination satisfies the requirements of due process. However, neither the facts in this matter nor the law support the FDIC's position.

Due process requires notice and an opportunity to be heard "at a meaningful time and in a meaningful manner". Armstrong v. Manzo, 380 U.S. at 552. This court has consistently held that the notice and opportunity must come **before** a person is deprived of a constitutionally protected right to employment. Cleveland Board of Education v. Loudermill, 470 U.S. at 542; Board of Regents v. Roth, 408 U.S. at 569-570; Perry v. Sindermann, 408 U.S. at 599-603. A post-deprivation hearing is only justified in "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." Boddie v. Connecticut, 401 U.S. at 379.

As this Court stated in Logan v. Zimmermann Brush Co., 455 U.S. 422, 434 (1982):

> [T]he timing and nature of the required hearing "will depend on appropriate accommodation of the competing interests involved." Goss v. Lopez, 419 U.S. at 579. These include the importance of the private interests and the length or finality of the deprivation. See Memphis Light, Gas & Water Div. v. Craft, 436 U.S., at 19, and Mathews v. Eldridge, 424 U.S., at 355 ... the likelihood of government error ... and the magnitude of the governmental interests involved, see ibid, and Wolff v. McDonnell, 418 U.S., at 561-563. (Footnote omitted).

It is undisputed that the contractual right to continued employment is a fundamental right subject to due process protection. Cleveland Board of Education v. Loudermill, 470 U.S. at 543; Fusari v. Steinberg, 419 U.S. 379, 389 (1975); Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 264 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337, 340 (1969). In addition, the receiver's decision to terminate is final. It

is highly unlikely that any post-deprivation hearing would provide the only adequate remedy in this case - reinstatement. Moreover, given the FDIC's description of the hasty nature in which its decisions are made, it would appear that the likelihood of government error in determining whether or not an employment contract is burdensome is high indeed.

Therefore, the employee's input is important to ensure an accurate decision. As this Court observed in Cleveland Board of Education v. Loudermill, 470 U.S., at 543:

> Dismissals for cause will often involve factual disputes. Cf. Califano v. Yamasaki, 442 U.S. 682, 686 (1979). Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decision maker is likely to be before the termination takes effect. See Goss v. Lopez, 419 U.S., at 583-584, Gagnon v. Scarpelli, 411 U.S. 778, 784-786 (1973).

Apparently, because of the magnitude of the employee's interest in a pre-deprivation hearing, the FDIC chooses to focus on the

government interests involved, i.e., "to protect the interests of depositors and to maintain the public confidence in our banking institutions." FDIC v. Mallen, 486 U.S. 230, 241 (1988). The FDIC asserts that during a "purchase and assumption" transaction, "immediate termination of the employment of top management is justified by more than merely the need to cut costs." FDIC brief pg. 38. The FDIC makes the bald assertion that "[t]he receiver no longer needs the assistance of top management. And the acquiring institution ordinarily seeks to place its own personnel in charge and is not eager to keep in place the former management, which was responsible for or associated with the policies that led to the institution's failure." Id. [4]

[4] Because Meyer had no responsibility for Fidelity's loan policies (J.A. p.72-73), this rationale has no application in the case at bar or in a situation where the employee was not "responsible for or associated with the policies that led to the 'institution's failure.'"

Nothing in the record indicates that the duties and responsibilities carried out by respondent or any other Fidelity employee ceased to exist during the period in which the receiver attempted to arrange for a "purchase and assumption" transaction. The record is also silent on whether or not the FDIC was able to "cut costs" by having someone else perform these duties.

Moreover, if the institution is not immediately closed, as in the case at bar, there is a need for employees, management or otherwise, to carry out the day-to-day operations of the institution. In this case, Meyer's duties as Vice President of Branch Operations, negotiating leases and personnel and administrative management (J.A. 72) certainly did not evaporate when Fidelity went into receivership.

Under the circumstances the public interest in retaining qualified employees to avoid the cost of training new ones as well as "keeping citizens usefully employed rather than taking the possibly erroneous and counterproductive step of forcing...employees

onto welfare rolls" (Cleveland Bd. of Educ. v. Loudermill, 470 U.S. at 544) mandates a pre-deprivation hearing. Anything less would result in additional cost with a corresponding decrease in the institution's assets and further erosion in the "public confidence."

Finally, whether or not the acquiring institution seeks to replace the employees with its own personnel is a decision the acquiring institution can make at the time of purchase.

Given the realities of the need for the institution to continue to function, the need for prompt action is not inconsistent with providing management or other employees with pre-deprivation notice and a hearing. [5]

[5] Although the need to achieve government goals through prompt procedures is a legitimate government interest, "the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." Stanley v. Illinois, 405 U.S. 645, 656 (1972).

None of the reasons cited by the FDIC establish a compelling "necessity for quick action" which would outweigh the employee's right to notice and a pre-deprivation hearing.

Moreover, the hearing need not be a full blown trial. All that is required is an opportunity to respond either orally or in writing. Cleveland Board of Education v. Loudermill, 470 U.S. at 546. Notice and the hearing can occur simultaneously. Goss v. Lopez, 419 U.S. at 582. Such a procedure would not impose a significant burden on the FDIC.

As stated by Justice Marshall in his dissenting opinion in Board of Regents v. Roth, 408 U.S. at 591:

> It may be argued that to provide procedural due process to ... employees ... would place an intolerable burden on the machinery of government ... The short answer to that argument is that it is not burdensome to give reasons when reasons exist. Whenever ... an employee is discharged ... there

should be some reason for the decision. It can scarcely be argued that government would be crippled by a requirement that the reason be communicated to the person most directly affected by the government's action. Where there are numerous applications for jobs [and presumably terminations following a take-over by a receiver], it is likely that few will choose to demand reasons for not being hired [or fired]. But, if the demand for reasons is exceptionally great, a summary of procedures can be devised that would provide fair and adequate information to all persons. As long as the government has a good reason for its actions, it need not fear disclosure. It is only where the government acts improperly that procedural due process is truly burdensome. And that is precisely where it is most necessary. ... 'Experience teaches ... that the affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits from occurring. When the government knows it may have to justify its decisions with sound reasons, its conduct is likely to be more cautious, careful and correct. (citations omitted)

The underlying principle of due process is fairness. "[F]airness can rarely be obtained [however] by secret, one-sided determination of facts decisive of rights." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring) cited with approval in Fuentes v. Shevin, 407 U.S. at 81.

In order to fulfill its purpose, the right to notice and a hearing must be granted "at a time when the deprivation can still be prevented." Fuentes, 407 U.S. at 81. For although a subsequent hearing may technically undo that which has already been done, a subsequent hearing and even a damage award cannot undo the fact that the arbitrary taking of the protected property has already occurred. Id. at 82. "This Court has not ... embraced the general proposition that a wrong may be done if it can be undone." Id. quoting Stanley v. Illinois, 405 U.S. 645, 647 (1972).

CONCLUSION

An implied contract restricting an employer's right to terminate for cause is a constitutionally protected property right. Once the government arbitrarily, unfairly and/or mistakenly deprives a person of that right without due process, there is no effective remedy. The burden of providing a pre-deprivation hearing is minimal, especially in light of the harm suffered by the employee. Accordingly, the Ninth Circuit properly weighed the competing interests in finding that Meyer's due process rights had been violated. NELA therefore respectfully requests that the decision of the Ninth Circuit be affirmed.

Respectfully Submitted,

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